Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

U.S. Customs Service
T.D. 89–53 Through 89–56
Proposed Rulemaking
U.S. Court of International Trade
Slip Op. 89–46 Through 89–51
Abstracted Decisions:
Classification: C89/48 Through C89/56
Notice

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 128, 143, and 178

(T.D. 89–53)

PROCEDURES FOR CLEARANCE OF CARGO CARRIED BY EXPRESS CONSIGNMENT OPERATORS OR CARRIERS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to set forth revised special informal entry procedures applicable to the entry and clearance of cargo carried by the various entities which comprise the express consignment industry. These regulations further refine and expand upon the existing procedures which recognize the special needs of the growing express consignment industry. The member countries of the Customs Cooperation Council have recently examined the industry and associated issues and have adopted international guidelines which established various definitions, including the term "Express Consignment Operators or Carriers."

The overwhelming growth of this industry requires Customs to provide more expedited clearance procedures. These amendments will further promote uniform, fair and consistent treatment of the various courier and express air services, while at the same time better assuring the protection of the revenue in accord with all applicable laws and regulations.

DATES: These regulatory amendments are effective June 7, 1989. Current express consignment entities seeking to continue their previously approved status must file the application by June 7, 1989 and must fully comply with the provisions contained in this document by November 3, 1989.

FOR FURTHER INFORMATION CONTACT: Operational aspects: Vincent Dantone, Office of Inspection and Control, (202) 566–5354; Legal aspects: Ken Paley, Entry Rulings Branch, (202) 566–5765.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 16, 1987, Customs published a notice in the Federal Register (52 FR 47729), proposing to add a new Part 128 to the Customs Regulations (19 CFR Part 128), to set forth revised special informal entry procedures applicable to the express consignment industry which recognized the needs of this growing industry. The proposed new regulations provided for incorporation of the current provisions of §§ 143.21(1) and 143.29, Customs Regulations (19 CFR 143.21(1) and 143.29), with certain modifications that provided for the filing of a written application and a procedure for Customs approval of express consignment and hub facilities; established advance manifest requirements; established bond requirements; generally raised the informal entry ceiling to $1250 for those qualifying to use the procedures; eliminated the distinction between shipments valued at $250 or less and those valued in excess thereof; raised the value level of shipments which must be segregated if an advance manifest is used from $5.00 to $25.00; streamlined informal and formal entry procedures: required all entry numbers to be furnished to Customs in a Customs approved bar coded readable format; and permitted the district director to waive production of entry documents in certain cases.

The proposed regulations also provided for the extension of the district director's authority to require the consolidation of shipments under one entry. The proposed amendments were designed to promote uniform, fair, and consistent treatment of the various courier and express services and make the procedures available to all operators, carriers, and other entities that meet the criteria, while at the same time assuring the protection of the revenue in accord with all applicable laws and regulations.

Comments on the proposal were to have been received on or before February 16, 1988. Pursuant to a request to extend the comment period, Customs extended the comment period to March 1, 1988.

All imported merchandise entering the Customs territory of the U.S. is subject to procedures relating to entry and clearance. The procedures ensure the proper valuation, and tariff classification of the merchandise for the purpose of collecting the lawful amount of duties, as well as compliance with all other laws and regulations administered and enforced by Customs. Depending upon its value, different procedures are provided for the entry and clearance of merchandise.

Formal entry procedures are set forth in Part 141, Customs Regulations (19 CFR Part 141), which are applicable, with certain exceptions, to shipments of merchandise valued in excess of $1000. Informal entry procedures contained in Part 143, Customs Regulations

(19 CFR Part 143), are generally limited to shipments of merchandise valued at $1000 or less.

Although the procedures for the informal entry of merchandise are less technical and detailed than those for formal entry, they may still present an impediment to courier and express services seeking to fulfill their function of expedited delivery.

The trend in the express consignment industry for time-sensitive clearance of cargo and the processing of entry documents is well recognized by Customs. Because of the special needs of the growing express consignment industry, by T.D. 86–143, published in the Federal Register of July 22, 1986 (51 FR 26243), informal entry procedures were adopted. These procedures are set forth in §§ 143.21(1) and 143.29, Customs Regulations (19 CFR 143.21(1), 143.29). These procedures have helped the industry and Customs to cope with an ever-increasing workload. Nevertheless, Customs recognized that the procedures could be improved. In reaching this conclusion, Customs noted that major express consignment companies have averaged over a 400% increase in imported cargo carried during the last 2 years while Customs staffing levels have remained static at express industry facilities due to manpower constraints. A further 150% increase in volume is expected in the coming year.

The Customs Cooperation Council, an international organization in which the United States participates, recently examined the express consignment industry. It noted the problems raised by onboard and fast parcel services as well as the time-sensitive nature of such consignments. The Council's study, as noted in the May 1, 1987, report of its Permanent Technical Committee (Document 34.040), highlighted the need for the Customs services of the Council's member countries to provide a rapid reliable control and clearance system for this type of traffic.

It has now been determined, as stated in the notice, that more detailed and accurate information from the express consignment industry is necessary for Customs to streamline its processing. Certain advance information on incoming shipments and full reimbursement for services rendered is necessary for Customs to assist the industry while maintaining Customs enforcement posture.

The proposed rule set forth revised special informal entry procedures applicable to the express consignment industry in a new Part 128, Customs Regulations (19 CFR Part 128). The new Part 128 defines an express consignment operator or carrier and certain other terms. It establishes an approval process for express consignment facilities that, in addition to other requirements, mandates participation in Customs data processing system for entry and entry release processing. These procedures will be available to all operators, carriers and other entities that can meet the criteria set out in these regulations.

Two types of installations presently utilized by the express consignment industry are being recognized. The first is a centralized hub facility which is a separate, unique, single purpose facility normally operating outside of Customs operating hours; the facility must be approved by the district director for entry filing, examination and release of express consignment shipments. The second type of installation is the express consignment carrier facility, which is a separate or shared specialized facility approved by the district director solely for the examination and release of express consignment shipments.

Because of the high volume of entries that the major overnight courier services handle under existing criteria, they could qualify to be designated as a port of entry. As such, Customs inspectional services would be provided at all times at no additional cost to the courier service. All expenses for providing the service would be allocated out of the annual Customs budget appropriations in the same manner as it is done at other designated ports of entry.

Currently, in accordance with the User Charges Statute (31 U.S.C. 9701), the courier services must reimburse Customs for inspectional service occurring at places other than established ports of entry. The User Charges Statute was enacted to ensure that Federal Governmental services provided to individual recipients, as opposed to the general public, are self-sustaining to the greatest extent possible. The potential establishment of separate ports of entry for individual couriers would, in effect, be contrary to the Congressional intent concerning the User Charges Statute. Accordingly, by T.D. 87–65, published in the Federal Register of May 4, 1987 (52 FR 16328), the port of entry workload criteria were modified to provide that no more than half of the minimum 2500 consumption entries to be filed at a port can be attributed to one entity. That entity must compensate the Government for services provided under 31 U.S.C. 9701.

The new regulations incorporate the current provisions of §§ 143.21(1) and 143.29, Customs Regulations (19 CFR 143.21(1), 143.29), with certain modifications. As revised, they provide for a written application and approval process for express consignment and hub facilities; establish advance manifest requirements; establish bond requirements; raise the informal entry ceiling to $1250 for those qualifying to use the procedures; eliminate the distinction between shipments valued at $250 or less and those valued in excess thereof; streamline informal and formal entry procedures; require that all entry numbers be furnished to Customs in a Customs approved bar coded readable format; and permit the district director to waive production of entry documents in certain cases. The district director's current authority to require the consolidation of shipments under one entry is also extended. These amendments will further promote uniform, fair and consistent treatment of the various courier and express services and make the procedures avail-

able to all operators, carriers and other entities that can meet the criteria, while at the same time better assure the protection of the revenue in accord with all applicable laws and regulations.

The new Part 128 provides for an application processing fee in connection with the facility approval process. It is Customs intent to initially implement a two tiered fee system. A $500 fee would apply to the approval of facilities in existence at the time final regulations are published, as well as facilities which are changed or altered after having been previously approved, where such change or alteration does not amount to an expansion. This would cover the expenses of the district director's review of and response to the application, review of the proposed procedures by the port director and higher level Customs officials, and also cover administrative costs. An application fee of $1000 would apply to the approval of new or expanded facilities. The fee would cover, in addition to the expenses noted above, facility design review (including blueprint review) and on-site meetings between company and Customs officials to discuss the facility design, operational and procedural proposals. This fee system would be reviewed and revised periodically to reflect changes in expenses. Changes in the fee system will be published in the Federal Register and the CUSTOMS BULLETIN.

In order to conform the numbers of the new Part 128 to the Customs regulatory numbering scheme, some section numbers are being altered from those appearing in the proposed rule. This does not involve any substantive changes.

ANALYSIS OF COMMENTS

Seven hundred thirty-three comments were received in response to the notice published in the Federal Register on December 16, 1987 (52 FR 47229), and the comment period extension published in the Federal Register on February 19, 1988 (53 FR 4998). A synopsis and analysis of the comments received, identified by the regulatory section, as continued in the notice, to which they refer, is contained in Part I below. General comments are discussed in Part II. References to the aforementioned revised section numbers are parenthetically noted in the heading and/or body of each comment and regulatory provision, as appropriate.

PART I. SECTION BY SECTION SYNOPSIS AND ANALYSIS

1. Section 128.1 Definitions

With respect to the definition of "express consignment operator or carrier" several commenters suggested that the regulations and the benefits provided thereunder be made available for express consignments transported by all express services; i.e., on-board couriers, air freight forwarders, commercial airlines, all-cargo airlines, and post offices, provided that such shipments are in fact handled on a truly express basis and that the carrier involved provides an

appropriate level of cooperation with U.S. Customs. We agree and have changed the definition of an express operator to:

An "express consignment operator or carrier" is an entity operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control.

Numerous commenters also requested a softening of the term "guaranteed" contained in the same definition. The requests were based on the fact that most international express consignment companies do not guarantee timely delivery to the public. Therefore, the word "guaranteed" has been deleted from the definition and the word "reliable" substituted.

2. Section 128.1(d) and (e)

Numerous commenters objected to the distinction made in the definitions of a "hub" and an "express consignment carrier facility" and believe that only one definition for a processing facility should exist. We disagree. There is an obvious industry distinction between a "hub" and a "non-hub" operation. Customs developed the two definitions to specifically distinguish processing operations between a hub or spoke operation, where all express consignment cargo is delivered and random airports operations, where express consignment shipments are generally directly delivered to the city of destination. Customs, because of manpower constraints as well as the problems of clearing on-board courier or courier shipments (see § 128.1(c)) in passenger processing facilities, must have the option of directing all shipments to an "express consignment carrier facility" for the examination and release of express consignment cargo. In addition, the centralization of all aspects of the entry processing function has required Customs to establish centralized locations for the presentation of entry documentation, such as the Document Analysis Unit (DAU) at Kennedy Airport in New York.

3. Section 128.1(f)

Several commenters suggested that Customs should only be concerned with the items imported into the United States and not necessarily the entities involved in the importation process, and that the regulations and the definitions contained within should be confined to that issue. We disagree. The intent of the regulations is for the Customs Service to provide special procedures for the cargo imported by the express consignment operators or carriers. The two cannot be separated. That was the intent behind the definitions sections, and, in particular, § 128.1(f) dealing with closely integrated administrative control. However, we do agree with several of the comments suggesting a change in the phrase contained in § 128.1(f), "implemented by" to "indicated by" when referring to the control between the local company and the foreign affiliate.

Several commenters objected to the express consignment operator or carrier being responsible for reimbursement to Customs for special enforcement operations, as required in § 128.1(g). We agree and

have revised the definition of "reimbursable" to include only normal costs.

4. Section 128.2 Express Consignment Carrier Application and Approval Process (New section 128.11)

Several commenters suggested that the approval process for express consignment carrier hubs or facilities be handled centrally at Customs Headquarters. We disagree. The approval process should remain at the local/district level, since the managers at those levels are more familiar with their particular needs. However, Customs has developed its own handbook for guidance in the requirements of these facilities that will be adopted for national use.

5. Sections 128.2(b)(1) and 128.2(c) (New sections 128.11(b)(1) and 128.11(c))

Numerous comments were received regarding §§ 128.2(b)(1) and 128.2(c) (New §§ 128.11(b)(1) and 128.11(c)). The present language seems to imply that Customs would have total approval of the entire express consignment hub or facility construction (see § 128.2(c) (New § 128.11(c)). We agree that a clarification is necessary in those two sections, and that § 128.2(c) (new § 128.11(c)) should also reflect the revocation of approval when changes are implemented to the international cargo processing area without Customs approval. The two sections have been revised. Section 128.2(b)(1), as revised (new § 128.11(b)(1)), refers to a full description of the international cargo facilities rather than the general term facilities. Section 128.2(c) (new section 128.11(c)), as revised, will clarify that the changes or alterations referred to are limited to an approved international cargo processing facility. The revised section will also clarify that the failure to obtain prior approval for changes or alterations to the international cargo facility may result in the suspension of approval as an express consignment facility or hub and the procedures for processing cargo contained in this chapter.

6. Section 128.2(b)(7)(i) (new section 128.11(b)(7)(i))

One comment was received regarding § 128.2(b)(7)(i) (new section § 128.11(b)(7)(i)), suggesting, in connection with the contents of the applications for approval of an express consignment carrier or hub facility, that the language be changed to only require formal entry for cargo to be processed in the Customs Automated Commercial System (ACS) and its associated modules. We disagree. We believe that such a change would be restrictive. It would not allow future changes in the ACS system to permit the processing of informal entries. It also would prohibit processing of informal entries and cargo exempt from entry in the Air Cargo Automated Manifest System.

Also, it became apparent that while express consignment entities were agreeing to use ACS there was no specific provision that entries be submitted thereunder. In order to clarify this point, § 128.5 (New § 128.23) is being revised. The final version thereof provides

that the entry data concerning articles subject to entry must be transmitted in accordance with ACS requirements.

7. Section 128.2(b)(7)(v) (new section 128.11(b)(7)(v))

Several comments were received, in connection with the contents of the agreement an express consignment entity must file in connection with its facility application, that the language in this subsection is too broad. We disagree. This subsection was included to bring uniformity in the reimbursement of costs incurred by the Customs Service and which are currently being reimbursed by express consignment operators and carriers operating at so-called "User Fee" airports.

8. Section 128.2(d) (new section 128.12)

Numerous commenters indicated problems with § 128.2(d) (new § 128.12) dealing with the appeal of the denial of an application, the lack of specific appeal steps, and the limitation of 14 calendar days in which to appeal the decision of the district director. We agree. We, therefore, have rewritten the provision.

9. Section 128.3(a) and (b) Manifest Requirements (new section 128.21(a) and (b))

All comments received from current express consignment companies reflected strong opposition to segments contained in this subpart. Specifically, the objections were to the requirement of manifesting separately all articles specifically exempt from entry by § 141.4 Customs Regulations (19 CFR 141.4). We strongly disagree. The need to manifest all incoming cargo for control and enforcement screening purposes is a vital and essential concern of the Customs Service. It is necessary if the Customs Service is to continue to achieve its mission to preserve and protect the revenue of the United States while at the same time preventing the importation of contraband. Several commenters observed the so-called disparity of processing and manifesting requirements as related to this issue and the international shipments carried by the United States Postal Service. Many express carriers believe that they should be treated by Customs in the same manner and with the same requirements and regulations imposed upon postal shipments. The Customs Service is bound to observe the numerous bilateral agreements and treaties negotiated by our Government with the International Postal Union and its member countries. We believe that the current procedures established by the Customs Service also achieve their objective with regard to postal importations.

10. Section 128.3(c) Explanation of Manifest Amendments

Although this provision was not the subject of a specific comment, it has been determined that the content of the proposed provision was essentially procedural. Since the procedure for the explanation of manifest amendments for overages and shortages is already covered elsewhere in the Customs Regulations (§ 4.12 as to

vessels, § 122.49 as to aircraft, and § 123.9 as to land vehicles) the provision is excluded from the final rule.

11. Section 128.6 Informal Entry Procedures (new section 128.24)

In the course of reviewing comments on this section we noted that paragraph (a), which generally permits the informal entry of shipments not exceeding $1250 in value and the consolidation of such shipments if each is valued at $1250 or less, was confusing. It appears, as proposed, to only permit the consolidation of shipments which are not subject to this provision, i.e., prohibited or restricted merchandise, quota merchandise, etc. The paragraph has been altered to correct this deficiency while still permitting the consolidation of shipments valued under $1250. Also, several commenters were concerned about the increase in the informal entry ceiling from $1000 to $1250 being limited to the express consignment industry. We agree that such an inequity should not exist and will change the limit for other importations in a separate Federal Register document.

A commenter questioned the meaning of the phrase "other necessary information" appearing at the end of the second sentence of § 128.6(c) (new § 128.24(c)) which identifies the documents which must be attached to the Custom Form 3461 and the information that must appear therein. The provision is being altered to clarify that it covers information which may be necessary in the case of a particular shipment, local condition, or other situation identified from time to time by the district director in charge of the port of entry.

We noted, as a result of several comments, that § 128.6(d) (new § 128.24(d)) conveyed the meaning that articles valued at $25 or less could be administratively exempted from duty and tax. Since the statutory authority for administrative exemptions generally provides for only a $5 limit in such cases, the provision is being altered.

12. Section 128.8 Simplified Entry Document Procedures (new section 128.26)

Several commenters expressed a lack of understanding of the reasons for the furnishing of entry numbers in approved bar coded readable format as required by § 128.8(a) (new § 128.26(a)). The purpose of this requirement is to permit the expedited processing of entry paperwork and cargo release. The section has been modified to clarify this point.

PART II—GENERAL COMMENTS

1. Certain commenters believe that the proposed procedures amount to an *ultra vires* amendment of the governing law in the guise of regulations.

We believe that the regulatory provisions of Part 128 do not exceed the authority provided by the statutes listed in the authority citation for Part 128. Taken together, those statutes provide the Secretary of the Treasury with rather broad discretion in prescrib-

ing rules and regulations to govern the areas which are the subject of the regulations.

2. The modified system proposed for the clearance of express consignment cargo, according to some commenters, weakens safeguards and procedures mandated by law covering the entry of merchandise into the United States.

This issue was raised when we proposed the addition of§§ 143.21(1) and 143.29 to the Customs Regulations. We responded in T.D. 86–143 by indicating that we are aware of the potential for smuggling and other abuses, that we currently conduct random intensive examinations of merchandise from courier and air express shipments, that we will conduct audits on the operations of the express companies and brokers to ensure that proper duty has been collected, and that we are negotiating agreements with the companies setting forth specific preventative steps that can be taken to ensure that smuggling and other abuses are detected and reported to us. We should now report that we followed through on those actions and are satisfied with the level of compliance observed. We will continue with these procedures.

3. The proposed procedures, according to certain commenters, vastly magnify the potential for improper classification and valuation of merchandise, and unauthorized release.

The issue was raised in the comments received in connection with T.D. 86–143. Customs will take steps similar to those identified in response to the previous comment, such as audits and intensive examinations to insure proper classification and valuation of merchandise.

4. Some commenters believe that the proposed regulations fail to address the question of adequate bond coverage for the express companies "in-house" brokers.

Customs believes that existing regulations already address this issue and that in appropriate cases bond coverage can be increased.

5. Certain commenters believe that the proposed regulations permit *per se* violation of § 111.36 of the Customs Regulations.

The proposed regulations themselves do not authorize any action which is in direct conflict with § 111.36 of the Customs Regulations. The problem raised is one which could arise from any transaction in which a broker has business relations with an unlicensed person; it is not limited to transactions such as those contemplated by Part 128. Such a problem, when and if it arises, may be dealt with in the same manner as when it arises in any other context.

6. The discriminatory and anti-competitive nature of the present and proposed expedited clearance procedures must be corrected according to some broker commenters.

As we pointed out in T.D. 86–143, courier and express air service companies must still use a licensed broker to transact Customs business. Different brokers will acquire different shares of this business,

but the brokerage industry is not being excluded from this category of transactions.

7. Some commenters raised concerns regarding the possible violation of the Regulatory Flexibility Act and E.O. 12291.

The Express Consignment Industry Regulations do not place an increased regulatory burden on a significant number of a small entities such as the Regulatory Flexibility Act and E.O. 12291 were designed to prevent. They provide simplified procedures which are available to anyone wishing to take advantage of them. While some entities may be better able to utilize the procedures than others, the ability to do so is based on competitive factors and not on a regulatory burden. In fact, some comments received from small entities praised the proposal.

Paperwork Reduction Act

The collection of information contained in this final regulation has been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1515–0144. The estimated average burden associated with the collection of information in this final rule is 15 minutes per respondent or recordkeeper.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to U.S. Customs Service, Paperwork Management Branch, Washington, D.C. 20229 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Paperwork Reduction Project (1515–0144), Washington, D.C. 20503.

Part 178, Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and the control number assigned by OMB is being amended to add § 128.11 thereto.

Drafting Information

The principal author of this document was Arnold L. Sarasky, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

Determination

After carefully analyzing the comments received, and further consideration of the matter, it has been determined to adopt the regulatory changes as proposed with the modifications noted.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that the amendment will not have a significant economic impact on a substantial number of small enti-

ties. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

LIST OF SUBJECTS

19 CFR Part 128

Carriers, Couriers, Customs duties and inspection, Express Consignments, and imports.

19 CFR Part 143

Customs duties and inspection, Imports.

19 CFR Part 178

Reporting and recordkeeping requirements, Paperwork requirements, Collection of information.

AMENDMENTS TO THE REGULATIONS

Parts 143 and 178 are amended and a new Part 128 is added to Chapter I, Title 19, Code of Federal Regulations, as set forth below:

PART 128—EXPRESS CONSIGNMENTS

§ 128.0 Scope.

SUBPART A—GENERAL

§ 128.1 Definitions.

SUBPART B—ADMINISTRATION

§ 128.11 Express consignment carrier application process.

§ 128.12 Application approval/denial and suspension of operating privileges.

§ 128.13 Application processing fee.

SUBPART C—PROCEDURES

§ 128.21 Manifest requirements.

§ 128.22 Bonds.

§ 128.23 Entry requirements.

§ 128.24 Informal entry procedures.

§ 128.25 Formal entry procedures.

§ 128.26 Simplified entry document procedures.

Authority: 19 U.S.C. 66, 1202 (Gen. Headnote 11, TSUS; Gen. Note 8, HTSUS), 1484, 1498, 1551, 1555, 1556, 1565, 1624.

§ 128.0 Scope.

This part sets forth requirements and procedures for the clearance of imported merchandise carried by express consignment operators and carriers, including couriers, under special procedures.

SUBPART A—GENERAL

§ 128.1 Definitions.

For the purpose of this part the following definitions shall apply:

(a) *Express consignment operator or carrier.* An "express consignment operator or carrier" is an entity operating in any mode or intermodally moving cargo by special express commercial service under closely integrated administrative control. Its services are offered to the public under advertised, reliable timely delivery on a door-to-door basis. An express consignment operator assumes liability to Customs for the articles in the same manner as if it is the sole carrier.

(b) *Cargo.* "Cargo" means any and all shipments imported into the Customs territory of the United States by an express consignment operator or carrier whether manifested, accompanied, or unaccompanied.

(c) *Courier shipment.* A "courier shipment" is an accompanied express consignment shipment.

(d) *Hub.* A "hub" is a separate, unique, single purpose facility normally operating outside of Customs operating hours approved by the district director for entry filing, examination, and release of express consignment shipments.

(e) *Express consignment carrier facility.* An "express consignment carrier facility" is a separate or shared specialized facility approved by the district director solely for the examination and release of express consignment shipments.

(f) *Closely integrated administrative control.* The term "closely integrated administrative control" means operations must be sufficiently integrated at both ends of the service (i.e., pick-up and delivery) so that the express consignment company can exercise a high degree of control over the shipments, particularly in regard to the reliability of information supplied for Customs purposes. Such control would be indicated by substantial common ownership between the local company and the foreign affiliate and/or by a very close contractual relationship between the local company and its foreign affiliate(s) (*e.g.,* a franchise arrangement).

(g) *Reimbursable.* "Reimbursable" means all normal costs incurred at an express consignment operator's hub or an express consignment carrier facility that are required to be reimbursed to the Government.

SUBPART B—ADMINISTRATION

§ 128.11 Express consignment carrier application process.

(a) *Facility application.* Requests for approval of an express consignment carrier or hub facility must be in writing to the district director.

(b) *Application contents.* The application for approval of an express consignment carrier or hub facility must include the following:

(1) A full description of the international cargo facilities, including blueprints, floor plans and facility location(s).

(2) A statement of the general character of the express consignment operations.

(3) An estimate of volume of transactions by:

(i) Formal entries.

(ii) Informal entries.

(iii) Shipments not requiring entry (see § 128.23 of this Part).

(4) An application processing fee, as set forth in paragraph (e) of this section.

(5) A list of principal company officials or officers.

(6) A projected start-up date, and days and hours of operation.

(7) An agreement that the express consignment entity will:

(i) Ensure that all cargo will be processed in the Customs Automated Commercial System (ACS) and associated modules, including, but not limited to, Automated Broker Interface (ABI), Automated Manifest System (AMS), Cargo Selectivity, and Statement Processing.

(ii) Sign and implement a narcotics enforcement agreement with Customs.

(iii) Provide, without cost to the Government, adequate office space, equipment, furnishings, supplies and security as per Customs specifications.

(iv) Timely pay all reimbursable costs, as determined by the district director.

(v) Pay to Customs all relocation, training and all other exceptional costs and expenses incurred by Customs in relocating necessary staff to the company's hub location to provide service to the company and to pay expenses incurred by Customs due to termination or decline of operations at the facility.

(c) *Changes or alterations to facility.* All proposed changes or alterations to an existing approved international cargo processing facility must be submitted in writing to the district director for approval prior to the implementation thereof and shall contain the information specified in paragraph (b) of this section. Failure to obtain Customs approval by an express consignment operator or carrier for any modifications to the international cargo processing area may result in the suspension of approval as an express con-

signment facility or hub and the procedures for processing cargo contained in this part.

§ 128.12 Application approval/denial and suspension of operating privileges.

(a) *Notice.* (1) The district director shall promptly notify the applicant in writing of the decision to approve or deny the application to establish an express consignment carrier or hub facility or to suspend or revoke operating privileges at an existing facility.

(2) The notice shall specifically state the grounds for denial or for the proposed suspension or revocation.

(b) *Appeal.* The express consignment entity may file a written notice of appeal seeking review of the denial or proposed suspension or revocation within 30 days after notification.

(c) *Recommendation.* The district director shall consider the allegations and responses in the appeal unless, in the case of a suspension or revocation, the express consignment entity requests a hearing. The appeal along with the district director's recommendation shall be forwarded to the Commissioner of Customs or his designee for a final administrative decision.

(d) *Hearing.* In the case of a proposed suspension or revocation, a hearing may be requested within 30 days after notification. If a hearing is requested, it shall be held before a hearing officer appointed by the Commissioner of Customs or his designee within 30 days following the express consignment entity's request. The entity shall be notified of the time and place of the hearing at least 5 days prior thereto. The express consignment entity may be represented by counsel at such hearing, and all evidence and testimony of witnesses in such proceedings, including substantiation of the allegations and the responses thereto shall be presented, with the right of cross-examination to both parties. A stenographic record of any such proceeding shall be made and a copy thereof shall be delivered to the express consignment entity. At the conclusion of the hearing, all papers and the stenographic record of the hearing shall promptly be transmitted to the Commissioner of Customs or his designee together with a recommendation for final action. The express consignment entity may submit in writing additional views or arguments to the Commissioner or his designee following a hearing on the basis of the stenographic record, within 10 days after delivery to it of a copy of such record. The Commissioner or his designee shall thereafter render the decision in writing, stating the reasons therefor. Such decision shall be served on the express consignment entity, and shall be considered the final administrative action.

§ 128.13 Application processing fee.

Each operator of an express consignment hub or carrier facility will be charged a fee to establish, alter, or relocate such facility which shall be determined under the provisions of 31 U.S.C. 9701. The fee will be periodically reviewed and revised to reflect changes

in processing expenses and any changes thereto will be published in the Federal Register and CUSTOMS BULLETIN.

SUBPART C—PROCEDURES

§ 128.21 Manifest requirements.

(a) *Additional information.* Express consignment operators and carriers shall provide the following manifest information in advance of the arrival of all cargo, including all articles for which an entry is not required as noted in § 128.23 (which shall be listed separately and their entry status noted), in addition to the information and documents otherwise required by this chapter:

(1) Country of origin of the merchandise.

(2) Shipper name, address and country.

(3) Ultimate consignee name and address.

(4) Specific description of the merchandise and, unless the commodity is exempt from entry requirements as noted in § 128.23, the Tariff Schedules of the United States (TSUS) item number or the Harmonized Tariff Schedules of the United States (HTSUS) subheading number, as appropriate.

(5) Quantity.

(6) Shipping weight.

(7) Value.

(b) *Sorting of cargo.* If the shipments are physically sorted by country of origin of the merchandise when they arrive at the hub or express consignment facility and are presented to Customs in this manner, the advance manifest information shall also be provided with the merchandise segregated by country of origin.

§ 128.22 Bonds.

Each express consignment operator or carrier must be recognized by Customs as an international carrier and approved as a carrier of bonded merchandise, and shall file bonds on Customs Form 301, containing the bond conditions set forth in §§ 113.62, 113.63, 113.64 and 113.66 of this chapter, to insure compliance with Customs requirements relating to the importation and entry of merchandise as well as the carriage and custody of merchandise under Customs control.

§ 128.23 Entry requirements.

(a) *General rule.* All articles carried by an express consignment entity shall be entered. Except as provided in paragraph (b) of this section, all such entities utilizing the procedures in this part shall comply with the requirements of the Customs Automated Commercial System (ACS). This includes the Automated Manifest System (AMS), Cargo Selectivity, Statement Processing, the Automated Broker Interface System (ABI), and enhancements of ACS.

(b) *Exception.* Articles specifically exempt from entry by Section 141.4 need not satisfy the general rule.

§ 128.24 Informal entry procedures.

(a) *Eligibility.* Informal entry procedures may generally be used for shipments not exceeding $1250 in value which are imported by express consignment operators and carriers. Individual shipments valued at $1250 or less may be consolidated on one entry. Such procedures, however, may not be used for prohibited or restricted merchandise, merchandise which is subject to a quota or other quantitative restraints, or for any articles precluded from informal entry procedures by virtue of § 498, Tariff Act of 1930, as amended, (19 U.S.C. 1498).

(b) *Procedures.* Customs Form 3461, appropriately modified to cover all importations under the special procedures contained in this part, shall be submitted prior to the commencement of hub or express consignment carrier facility operations. The party with the right to file entry may submit a copy of the invoice or the advance manifest, as described in § 128.21 in lieu of other control documents.

(c) *Alternative procedure.* The party with the right to file entry may be required to submit an individual Customs Form 3461 covering the eligible shipments on a daily basis or by flight basis. Commercial invoices or advance manifests shall be attached to the Customs Form 3461 which will contain the entry number and such other information deemed necessary by the district director of Customs. A notation shall be placed on the Customs Form 3461 that the entry covers multiple shipments.

(d) *Low value shipments.* Shipments valued at $5 or less must be segregated from those valued at more than $5 if an advance manifest is used as the entry document.

(e) *Entry summary.* An entry summary (Customs Form 7501) must be presented in proper form, and estimated duties deposited, within 10 days of release of the merchandise under either the regular or alternative procedure described in this section.

§ 128.25 Formal entry procedures.

The district director may require a formal entry summary for an individual shipment or may require the consolidation of shipments under one such entry in accordance with the provisions of § 143.22 of this chapter.

§ 128.26 Simplified entry document procedures.

(a) *Entry number.* All entry numbers must be furnished to Customs in a Customs approved bar coded readable format in order to assist in the processing of express consignment cargo under the Customs Automated Commercial System (ACS).

(b) *Paper Entry Documentation Waiver.* The district director is authorized, at the time of entry, to accept the appropriate electronic equivalent in lieu of entry documents for those entries designated

as not requiring examination or review when the advance manifest requirements of § 128.21(a) of this part have been met.

PART 143—CONSUMPTION, APPRAISEMENT, AND INFORMAL ENTRIES

1. The authority citation for Part 143 would continue to read as follows:

Authority: 19 U.S.C. 66, 1481, 1484, 1498, 1624.

2. Section 143.21 is amended by removing paragraph (1).

3. Part 143 is amended by removing § 143.29.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 1624, 44 U.S.C. 3501 *et seq.*

2. Section 178.2 is amended by inserting the following in appropriate numerical sequence according to the section number under the columns indicated:

§ 178.2 Listing of OMB Control Numbers.

19 CFR Section	Description	OMB Control No.
* *	* * *	* *
§ 128.11	Express consignment carrier application and approval process	1515–0144
* *	* * *	* *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 1, 1989.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 8, 1989 (54 FR 19561)]

(T.D. 89–54)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued July 25, 1986, to December 7, 1988, inclusive, pursuant to Subpart C, Part 191, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was issued.

(DRA–1–09)
Dated: May 1, 1989.
File: 221389

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Armstrong World Industries, Inc.
Articles: Resilient vinyl sheet; tile flooring
Merchandise: Di-2-ethylhexyl phthalate; titanium dioxide; polyvinyl chloride resin
Factory: Lancaster, PA
Statement signed: July 7, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, November 18, 1988
Revokes: T.D.s 84–80–A, 84–155–B, and 86–127–B

(B) Company: Beatrice/Hunt-Wesson, Inc.
Articles: Tomato paste products; industrial bulk tomato paste
Merchandise: Tomato paste
Factories: Fullerton, Oakdale, and Davis, CA; Perrysburg, OH
Statement signed: May 8, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): Los Angeles (San Francisco Liquidation), July 25, 1986
Revokes: T.D. 84–79–J to cover successorship from Hunt-Wesson Foods, Inc.

(C) Company: The Dow Chemical Co.
Articles: HANDI-WRAP™ plastic film
Merchandise: Low density polyethylene
Factory: Bay City, MI

Statement signed: November 1, 1988
Basis of claim: Used in, less valuable waste
Rate forwarded to RCs of Customs: Houston & Chicago, December 7, 1988

(D) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: Crude flusilazole, flusilazole technical; flusilazole isomer; "Nustar" a/k/a "Punc" a/k/a "Olymp" fungicides
Merchandise: 4-bromofluorobenzene a/k/a para-bromofluorobenzene (PBFB); 1,2,4-triazole; tetra-n-butyl ammonium bromide (t–BAB)
Factory: Houston, TX
Statement signed: June 8, 1988
Basis of claim: Used in for crude flusilazole; used in, with distribution to the products obtained in accordance with their relative values at the time of separation for remaining products
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, November 18, 1988

(E) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: B/D Complex; Terbacil® technical; Bromacil technical; and various grades of Hyvar®, Sinbar®, Karmex®, Krovar®, and Velpar® herbicides
Merchandise: Methyl aceto acetate a/k/a MAA; bromacil technical; Diuron technical; Bromacil/Diuron complex a/k/a B/D complex a/k/a Krovar® technical
Factory: La Porte, TX
Statement signed: April 14, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, November 18, 1988
Revokes: T.D. 82–39–F

(F) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: Hydrogen peroxide 35% solution; oxone monopersulfate; sodium perborate tetrahydrate
Merchandise: Hydrogen peroxide
Factories: Memphis, TN; Gibbstown, JN; Charlotte, NC
Statement signed: November 24, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York & Boston (Baltimore Liquidation), September 30, 1988
Revokes: T.D. 79–155–F

(G) Company: E. I. du Pont de Nemours & Co., Inc.
Articles: Formaldehyde; 1,4,-butanediol; tetrahydrofuran; "Terathane" (Polytetramethylene ether glycol)
Merchandise: Methanol

Factories: Toledo, OH; Houston, TX; Niagara, NY; Denton, NC; Linden, NJ; Belle, WV
Statement signed: June 28. 1988
Basis of claim: Appearing in
Rate forwarded to RCs of Customs: Boston (Baltimore Liquidation) & New York, December 5, 1988
Revokes: T.D. 84–194–C

(H) Company: Foote Mineral Co.
Articles: Lithium hydroxide monohydrate
Merchandise: Lithium carbonate (crystals)
Factory: Duffield, VA
Statement signed: March 23, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, September 28, 1988

(I) Company: GAF Chemicals Corp.
Articles: Various product formulations of the following solvents and polymers; butyrolactone; 2-pyrrolidone; methyl pyrrolidone; vinyl pyrrolidone; THF; PBT; PVP; PVP iodine; Plasdone, n-methyl-2-pyrrolidone; Ganex; Gafquat
Merchandise: 1,4-butanediol (B1D)
Factories: Linden, NJ; Texas City, TX; Calvert City, KY
Statement signed: August 30, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, October 3, 1988
Revokes: T.D. 78–254–M (GAF Corp.)

(J) Company: Glove Metallurgical, Inc.
Articles: Magnesium ferrosilicon alloys
Merchandise: Magnesium
Factory: Beverly, OH
Statement signed: December 4, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, September 14, 1988

(K) Company: The Goodyear Tire and Rubber Co.
Articles: Morpholine
Merchandise: Kagarax/Morfax
Factories: Akron, OH; Calhoun, GA; Niagara Falls, NY; Bayport, Houston, and Beaumont, TX
Statement signed: March 17, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, September 23, 1988

(L) Company: The Goodyear Tire and Rubber Co.
Articles: Wingstay 100/Nailax
Merchandise: o-toluidine

Factories: Akron, OH; Calhoun, GA; Niagara Falls, NY; Houston, Beaumont, and Bayport, TX
Statement signed: April 8, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, October 19, 1988

(M) Company: The Hall Chemical Co.
Articles: Manganese acetate tetrahydrate
Merchandise: Electrolytic manganese metal
Factory: Wickliffe, OH
Statement signed: June 3, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, October 20, 1988

(N) Company: Ludlow Corp., Twitchell Div.
Articles: Textilene® fabrics and yarns (vinyl coated)
Merchandise: Polyester yarn
Factory: Dothan, AL
Statement signed: July 27, 1988
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, September 12, 1988

(O) Company: Reading Alloys, Inc.
Articles: 50% aluminum–50% vanadium master alloy
Merchandise: Fused flake vanadium pentoxide
Factory: Robesonia, PA
Statement signed: August 24, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: Boston (Baltimore Liquidation), September 23, 1988
Revokes: T.D. 76–249–A and unpublished authorization letter of August 30, 1988

(P) Company: Rex-Rosenlew International, Inc.
Articles: Plastic printed film (printed polyethylene guesseted tubing)
Merchandise: Linear low density polyethylene resin
Factory: Thomasville, NC
Statement signed: March 9, 1988
Basis of claim: Used in, less valuable waste
Rate forwarded to RC of Customs: Miami, September 26, 1988

(Q) Company: Sterling Drug, Inc.
Articles: Omnipaque solution
Merchandise: Iohexol powder
Factory: McPherson, KS
Statement signed: December 28, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: New York, September 30, 1988

(R) Company: Sybron Chemicals, Inc.
Articles: Ionac (Na) (weakly acidic, carboxylic cation exchanger in sodium form)
Merchandise: Ionac cc (weakly acidic, carboxylic cation exchange resin in hydrogen form)
Factory: Birmingham, NJ
Statement signed: September 11, 1987
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, November 18, 1988

(S) Company: Titanium Wire Corp.
Articles: Titanium round bar, wire and weld wire
Merchandise: Alloyed and unalloyed titanium rod
Factory: Frackville, PA
Statement signed: June 6, 1988
Basis of claim: Appearing in
Rate forwarded to RC of Customs: New York, October 19, 1988

(T) Company: The Uniroyal Goodrich Tire Co.
Articles; Tires; tread rubber
Merchandise: Various chemicals, polyester fabric and cord, synthetic rubber, polyethylene wrap, fiber glass tire cord, bronze plated bead wire, nylon tire cord, brass plated steel tire cord
Factories: Ardmore, OK; Opelika & Tuscaloosa, AL; Woodburn, IN; Eau Claire, WI
Statement signed: July 12, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 26, 1988
Revokes: T.D. 89–32–Y to cover change in factory locations

(U) Company: The Uniroyal Goodrich Tire Co.
Articles: Yarns; synthetic industrial fabrics
Merchandise: Modacrylic staple fiber
Factories: Scottsville, VA; Hogansville & Thomaston, GA; Winnsboro, SC
Statement signed: July 12, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 26, 1988
Revokes: T.D. 89–32–X to cover change in factory locations

(V) Company: The Uniroyal Goodrich Tire Co.
Articles: Nylon tire fabrics, nylon belting fabrics, nylon hose yarns, nylon expansion joint fabrics
Merchandise: Nylon filament yars, 6 and 6/6
Factories: Winnsboro, SC; Scottsville, VA; Thomaston & Hogansville, GA
Statement signed: July 12, 1988
Basis of claim: Used in, less valuable waste
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 26, 1988
Revokes: T.D. 89–11–U to cover change in factory locations

(W) Company: The Uniroyal Goodrich Tire Co.
Articles: Polyester tire fabrics, polyester belting fabrics, polyester hose yarns; fiberglass tire fabrics; nylon tire fabrics; nylon belting fabrics
Merchandise: Nylon filament yarn; polyester filament yarn; fiberglass filament yarn
Factories: Hogansville & Thomaston, GA; Winnsboro, SC; Scottsboro, VA
Statement signed: July 12, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 26, 1988
Revokes: T.D. 89–23–Z to cover additional factory

(X) Company: The Uniroyal Goodrich Tire Co.
Articles: Tires (automobile, truck and aircraft)
Merchandise: Bronze plated, nylon and brass plated wire
Factories: Various as listed in statement
Statement signed: July 12, 1988
Basis of claim: Used in
Rate issued by RC of Customs in accordance with § 191.25(b)(2): New York, September 26, 1988
Revokes: T.D. 55775–I as amended by 68–210–J, 74–300–R and 76–249–W to cover successorship from Uniroyal, Inc.

(Y) Company: Wellman, Inc.
Articles: Nylon and polyester resins; nylon and polyester fiber
Merchandise: Nylon 6, nylon 66, PBT, PET resins and nylon 6, nylon 66, PBT, PET waste
Factories: Johnsonville, SC; Charlotte, NC; City of Commerce, CA
Statement signed: August 20, 1987
Basis of claim: Used in
Rate forwarded to RC of Customs: Miami, November 18, 1988

(Z) Company: Wickland Oil Terminals
Articles: Regular leaded and unleaded gasolines; premium leaded and unleaded gasolines
Merchandise: High and low octane blend stocks
Factory: Crockett, CA
Statement signed: September 16, 1988
Basis of claim: Used in
Rate forwarded to RCs of Customs: Houston and Los Angeles (San Francisco Liquidation), December 2, 1988

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19 CFR Part 4

(T.D. 89–55)

AMENDMENT TO THE CUSTOMS REGULATIONS CONCERNING COASTWISE TRANSPORTATION OF CERTAIN ARTICLES BY VESSELS OF ANTIGUA AND BARBUDA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding Antigua and Barbuda to the list of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports.

The Department of State has received satisfactory evidence that Antigua and Barbuda places no restrictions on the transportation of certain specified articles by vessels of the United States between ports in that country. This amendment recognizes reciprocal privileges for vessels registered in Antigua and Barbuda.

DATES: The reciprocal privileges for vessels registered in Antigua and Barbuda became effective on October 28, 1988. This amendment is effective May 8, 1989.

FOR FURTHER INFORMATION CONTACT: Paul Hegland, Carrier Rulings Branch, (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under the laws of the United States and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, provides that, upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Section 4.93(b)(2), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with these barges; certain empty instruments of international traffic; and certain stevedoring equipment and material.

On October 28, 1988, the Department of State advised the Chief, Carrier Rulings Branch, that Antigua and Barbuda places no restrictions on the transportation of any of the articles listed in the Act by vessels of the United States between ports in that country.

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

FINDING

On the basis of the information received from the Secretary of State and the Embassy of Antigua and Barbuda, it has been determined that Antigua and Barbuda places no restrictions on the transportation of the articles specified in section 27 of the Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883), by vessels of the United States between ports in that country. Therefore, appropriate reciprocal privileges are accorded to vessels registered in Antigua and Barbuda as of October 28, 1988.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this amendment merely implements a statutory requirement and involves a matter in which the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

INAPPLICABILITY OF THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Coastwise trade, Customs duties and inspection, Maritime carriers, Vessels.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in Antigua and Barbuda, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624, 46 U.S.C. App. 3;

* * * * * * *

§ 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * * * *

§ 4.93 [Amended]

2. Sections 4.93 (b)(1) and (b)(2), are amended by adding "Antigua and Barbuda", in appropriate alphabetical order to the lists of nations entitled to reciprocal privileges.

Dated: May 3, 1989.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, May 8, 1989 (54 FR 19560)]

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19 CFR Part 4

(T.D. 89–56)

AMENDMENT TO THE CUSTOMS REGULATIONS CONCERNING COASTWISE TRANSPORTATION OF CERTAIN ARTICLES BY VESSELS OF SAUDI ARABIA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding the Kingdom of Saudi Arabia to the list of nations which permit vessels of the United States to transport certain articles specified in section 27, Merchant Marine Act of 1920, as amended, between their ports.

The Department of State has received satisfactory evidence that Saudi Arabia places no restrictions on the transportation of empty cargo vans, empty lift vans, and empty shipping tanks, by vessels of the United States between ports in that country. This amendment recognizes reciprocal privileges for vessels registered in Saudi Arabia.

DATES: The reciprocal privileges for vessels registered in Saudi Arabia became effective on November 7, 1988. This amendment is effective May 8, 1989.

FOR FURTHER INFORMATION CONTACT: Paul Hegland, Carrier Rulings Branch, (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 27, Merchant Marine Act of 1920, as amended (46 U.S.C. App. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the United States except in vessels built in and documented under

the laws of the United States and owned by U.S. citizens. However, the 6th proviso of the Act, as amended, provides that, upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a foreign nation does not restrict the transportation of certain articles between its ports by vessels of the United States, reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1)), lists those nations found to extend reciprocal privileges to vessels of the United States for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks.

On October 31, 1988, the Department of State advised the Chief, Carrier Rulings Branch of the Customs Service Headquarters that the Kingdom of Saudi Arabia places no restrictions on the transportation of empty cargo vans, empty lift vans, and empty shipping tanks, by vessels of the United States between ports in that country.

The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

FINDING

On the basis of the information received from the Secretary of State and the Ministry of Foreign Affairs of the Kingdom of Saudi Arabia, it has been determined that Saudi Arabia places no restrictions on the transporation of empty cargo vans, empty lift vans, and empty shipping tanks, by vessels of the United States between ports in that country. Therefore, appropriate reciprocal privilages are accorded to vessels registered in Saudi Arabia as of November 7, 1988.

INAPPLICABILTY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because these amendments merely implement a statutory requirement and involve a matter in which the public is not particularly interested, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary. Further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1).

INAPPLICABILITY OF THE REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). That Act does not apply to any regulation such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

DRAFTING INFORMATION

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices of the Customs Service participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Cargo vessels, Coastwise trade, Customs duties and inspection, Maritime carrier, Vessels.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in Saudi Arabia, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624, 46 U.S.C. App. 3,

* * * * * * *

§ 4.93 also issued under 19 U.S.C. 1322(a), 46 U.S.C. App. 883;

* * * * * * *

§ 4.93 [Amended]

2. Section 4.93(b)(1), is amended by adding "Saudi Arabia" in appropriate alphabetical order to the list of nations entitled to reciprocal privileges.

Dated: May 3, 1989.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, May 8, 1989 (54 FR 19560)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 101

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO THE CUSTOMS FIELD ORGANIZATION IN THE NOGALES DISTRICT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule, solicitation of comments.

SUMMARY: This document proposes to amend the Customs Regulations governing the Customs field organization by changing the designation of Tucson from a Customs station to a port of entry. Adoption of this proposal would change the relationship of the Customs operations at Tucson, from that of a station under the supervision of a port, to that of a port, within the Nogales District. This redesignation is proposed as part of Customs efforts to improve the efficiency of its field operations. This document announces the proposed change in designation and invites public comments on the appropriateness of the action.

DATE: Comments must be received on or before July 7, 1989.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Headquarters, Room 2119, 1301 Constitution Avenue, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Linda Walfish, Office of Workforce Effectiveness and Development, Office of Inspection and Control, U.S. Customs Service, (202) 566–9425.

SUPPLEMENTARY INFORMATION:

Background

As part of its ongoing effort to improve its efficiency and service to the public, the Customs Service continually reviews its field service organization to assure that it best utilizes its resources. This review has identified the current relationship of the port of entry of Nogales and the Customs station of Tucson as one which is in need of reevaluation and modification. While the current status of Tuc-

son as a Customs station was appropriate at the time it was established in 1963 (T.D. 55986), recent developments have convinced Customs that Tucson should be designated a port of entry. The major elements behind the decision were the level of activity at Tucson, and operational aspects which will be facilitated once Tucson is granted port of entry status.

Tucson either meets or exceeds the minimum criteria for the levels of activity which have been identified in T.D. 82–371, as amended by T.D. 86–14 and T.D. 87–65, as being necessary to be eligible as a port of entry. By designating Tucson a port of entry, Customs management will have the opportunity to fully utilize the automated commercial system and provide the most efficient service possible to the public.

Proposed Port Limits

The limits of the proposed port of entry of Tucson will be the same as those of the current Customs Station: "The city of Tucson, Arizona, including the Tucson International Airport."

The Secretary of the Treasury is advised by the Commissioner of Customs in matters affecting the establishment, abolishment, or other changes in ports of entry. Customs ports of entry are established under the authority vested in the President by section 1 of the Act of August 1, 1914, 38 Stat. 623, as amended (19 U.S.C. 2), and delegated to the Secretary of the Treasury by Executive Order 10289, September 17, 1951 (3 CFR 1949–1953 Comp. Ch. II), and pursuant to authority provided by Treasury Department Order No. 101–5 (47 FR 2449).

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Regulations and Disclosure Law Branch, U.S. Customs Service. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury

Comments

Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Executive Order 12291

Because this proposal relates to the organization of the Customs Service, it is not a regulation or rule subject to E.O. 12291.

REGULATORY FLEXIBILITY ACT

It is certified that the provisions of the Regulatory Flexibility Act relating to initial and final regulatory analysis (5 U.S.C. 603, 604), are not applicable to this proposal because it will not have a significant economic impact on a substantial number of small entities.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies)

PROPOSED AMENDMENT

It is proposed to amend Part 101, Customs Regulations (19 CFR 101), as set forth below:

PART 101—[AMENDED]

1. The general authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1623, 1624.

§ 101.3 [Amended]

2. It is proposed to amend the list of Customs regions, districts and ports of entry in § 101.3(b) in the following manner:

In the South West Region, opposite "Nogales", under the column headed "Ports of entry", insert the word "Tucson", in the appropriate alphabetical order, followed by the number of this Treasury Decision in parenthesis.

§ 101.4 [Amended]

3. It is proposed to amend the list of Customs stations in § 101.4(c) in the following manner:

In the list of designated Customs stations and port having supervision, delete Nogales under the listing of districts, Tucson in the column listing customs stations, and Nogales under ports having supervision.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: May 1, 1989.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, May 8, 1989 (54 FR 19577)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
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Nicholas Tsoucalas
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Senior Judges

Morgan Ford

Frederick Landis

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Bernard Newman

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Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 89–46)

LMI—LA METALLI INDUSTRIALE, S.P.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AMERICAN BRASS, ET AL., DEFENDANT-INTERVENORS

Court No. 87–03–00560

In an affirmative dumping determination for brass sheet and strip from Italy, the Court affirms Commerce's denial of circumstance of sales adjustments for home market sales commissions, technical assistance salaries, pre-sale inventory expenses, and currency hedging expenses. The Court also finds that objections concerning credit rates under Italian law were not timely raised, and affirms Commerce's construction of a cost of credit based on the foreign producer's home country borrowing rate. The Court also finds that the Commission need not distinguish between imports of large and small magnitude in applying the cumulation statute, and that the Commission's injury determination is supported by the record and is according to law.

[Judgment for Defendant.]

(Decided April 11, 1989)

Barnes, Richardson & Colburn (*James H. Lundquist, David O. Elliott,* and *Matthew J. Clark*) and *Sandra Liss Friedman,* of counsel, for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, United States Department of Justice (*M. Martha Ries*); United States Department of Commerce (*Robert E. Nielsen*), and *Lyn M. Schlitt,* General Counsel, *James A. Toupin,* Assistant General Counsel (*Calvin H. Cobb, III*), of counsel, for defendant.

Collier, Shannon, Rill & Scott (*David A. Hartquist, Jeffrey S. Beckington, Carol A. Mitchell,* and *Kathleen Weaver Cannon*) for defendant-intervenors.

DICARLO, *Judge:* An Italian manufacturer of brass sheet and strip, LMI—La Metalli Industriale, S.p.A. (LMI), moves under Rule 56.1 of the Rules of this Court to challenge the final determination of the International Trade Administration of the United States Department of Commerce (Commerce) that brass sheet and strip from Italy is being sold in the United States at less than fair value, *Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from Italy,* 52 Fed. Reg. 816 (Jan. 9, 1987), *amended,* 52 Fed. Reg. 11,299 (Apr. 8, 1987), and also the final determination of the United States International Trade Commission (Commission) that a domestic industry in the United States is being materially injured by reason of less than fair value imports of brass sheet and strip from Italy, as cumulated with dumped and subsidized imports from

other countries, *Certain Brass Sheet and Strip from France, Italy, Sweden and West Germany,* Inv. Nos. 701–TA–270 and 731–TA–313, 314, 316 and 317 (Final), USITC Pub. No. 1951 (Feb. 1987), 52 Fed. Reg. 5839 (Feb. 22, 1987).

The Court has jurisdiction under 28 U.S.C. § 1581(c) (1982). The Court affirms the denial of circumstance of sale adjustments for home market sales commissions, pre-sale inventory expenses, currency hedging expenses, and technical personnel salaries. The Court also finds that plaintiffs did not raise timely objections concerning credit rates under Italian law, and affirms Commerce's construction of a cost of credit based on a lira borrowing rate rather than a dollar borrowing rate. The Court also finds that the Commission need not distinguish between imports of large and small magnitude in applying the cumulation statute, and finds that the Commission's material injury determination is supported by substantial evidence on the record as a whole and is according to law.

DISCUSSION

I. *Commerce's Less Than Fair Value Determination*

A. *Denials of Circumstance of Sales Adjustments*

LMI claims that Commerce erred in denying circumstance of sales adjustments for (1) home market selling commissions; (2) technical service salaries; (3) pre-sale inventory costs; and (4) currency hedging expenses.

Commerce is directed to make circumstance of sale adjustments to foreign market value where it is established "to the satisfaction of the administering authority" that the difference between United States price and foreign market value is wholly or partly due to differences in circumstances of sale. 19 U.S.C. § 1677b(a)(4)(B) (1982 & Supp. V 1987). As stated in *Smith-Corona Group, Consumer Prods. Div., SCM Corp.* v. *United States,* 1 Fed. Cir. (T) 130, 137, 713 F.2d 1568, 1575 (1983), *cert. denied,* 465 U.S. 1022 (1984):

> The statute does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority. Additionally, the statute does not define the term "circumstances of sale" nor does it prescribe any method for determining allowances. Congress has deferred to the Secretary's expertise in this matter.

Accord Hercules, Inc. v. *United States,* 11 CIT ——, 673 F. Supp. 454, 488 (1987); *Sawhill Tubular Div. Cyclops Corp.* v. *United States,* 11 CIT ——, 666 F. Supp. 1550, 1555 (1987).

The report of the House Committee on Ways and Means indicates that circumstance of sale adjustments "should be permitted if they are reasonably identifiable, quantifiable, and *directly related* to the sales under consideration and if there is clear and reasonable evidence of their existence and amount." H.R. No. 317, 96th Cong., 1st

Sess. 76 (1979) (emphasis added); *see Consumer Prods. Div., SCM Corp.* v. *Silver Reed Am., Inc.*, 3 Fed. Cir. (T) 83, 89, 753 F.2d 1033, 1038 (1985). Commerce's regulations implementing 19 U.S.C. § 1677b(a)(4)(B) provide in relevant part:

> (a) In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a *direct relationship to the sales which are under consideration.*
>
> (b) Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

19 C.F.R. § 3533.15 (1988) (emphasis added). To claim a circumstance of sale adjustment to foreign market value, expenses must be related to the sales of the products under investigation, rather than to sales generally. *See Ipsco, Inc.* v. *United States*, 12 CIT ——, 687 F. Supp. 633, 642 (1988). Adjustments for indirect expenses are allowed where the exporter's sales price is the basis of the United States price. *Consumer Prods. Div., SCM Corp., 3 Fed. Cir. (T) at 86–87, 753 F.2d at 1036.*

1. *Home Market Selling Commissions*

LMI contends Commerce should have allowed a circumstance of sale adjustment for home market selling commissions that LMI pays to its exclusive home-market sales agent and wholly-owned subsidiary, Pontinox Metallitalia S.R.L. (Pontinox). In denying the claimed adjustment, Commerce stated that it

> does not allow circumstances-of-sale adjustments for commissions paid to related parties. The principal [*sic*] behind denying such an adjustment is that such payments are merely intracompany transfers of funds. We have accepted commissions to related parties only when we have determined that those commissions were arm's length or where the commissions are directly related to particular sales under review. [*Drycleaning Machinery from West Germany; Final Results of Administrative Review of Antidumping Finding,* 50 Fed. Reg. 32,154 (Aug. 8, 1985); *Egg Filler Flats from Canada; Final Determination of*

Sales at Less Than Fair Value, 50 Fed. Reg. 24,009 (June 7, 1985).] LMI has not met these prerequisites for a circumstance-of-sale adjustment for home market commissions.

52 Fed. Reg. at 818 (Comment 3).

LMI argues that Commerce's reliance on a "policy" should not be a lawful substitute for analyzing the record, and, in any event, there is no "positive evidence of record" to support Commerce's conclusion that LMI's commission payments were neither at arm's length nor directly related. *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record,* at 25–27. LMI argues that for Commerce to begin from a standpoint that related party commissions are generally invalid is inconsistent with 19 C.F.R. § 353.15(b), which provides that "[r]easonable allowances also generally will be made for differences in commissions." LMI argues that this regulation "contains no qualifications regarding the relationship between the payor and the payee of the commission." *Plaintiff's Reply to Defendant's and Defendant-Intervenors' Responses in Opposition,* at 13. LMI argues that its relationship with Pontinox is at arm's length because it is based upon a registered agreement that specifies independent rights, duties, and restrictions. Conf. R. 473–80.

Commerce does not dispute the existence of a contractual selling arrangement between LMI and its wholly-owned subsidiary Pontinox, but states that "such an arrangement by itself does not negate the relationship between the two parties nor does it demonstrate that the commission payments to Pontinox were anything more than an intracompany transfer of funds." *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record,* at 17–18. Commerce states that since LMI owns 100 percent of Pontinox, there can be no question but that the two parties are related. *See* 19 U.S.C. § 1677b(e)(3)(E) (1982) ("related party" includes anyone owning five percent or more of the outstanding voting stock or shares of any organization). Consistent with a long-standing practice, Commerce determined that LMI's commission payments to Pontinox constituted nothing more than an intracompany transfer of funds and disallowed the claimed adjustment. *See, e.g., Final Determination of Sales at Less Than Fair Value; Bicycle Tires and Tubes from Taiwan,* 48 Fed. Reg. 19,437, 19,438 (Apr. 29, 1983); *Prestressed Concrete Steel Wire Strand from the United Kingdom; Final Determination of Sales at Less Than Fair Value,* 47 Fed. Reg. 56,690, 56,692 (Dec. 20, 1982).

LMI claims that its commission payments were directly related and therefore entitled to be treated as a difference in the circumstances of sale in Italy and the United States.

The record shows that LMI agreed to pay Pontinox commissions based on the net value of sales on a variety of LMI products, only two of which were under investigation. Conf. R. 471, 477. The agreement between LMI and Pontinox explains that there are two types

of payments to Pontinox: (1) a monthly sum in connection with expenses incurred by Pontinox while performing services that include administrative, accounting, credit, and support activities connected to business activities carried out in favor of LMI; and (2) a commission payment in return for Pontinox's services, calculated net of the value of raw material, packaging, transport, and other extra charges. R. 758. The 1985 profit margin of Pontinox was traced to "*total* revenues and *total* profits as shown in the Pontinox balance sheet." *Id.* (emphasis added). At verification, LMI "presented source documents used to calculate the percentage that total payments to Pontinox represent total LMI Italian sales of products under investigation and sales of other flat-rolled products." *Id.* Commerce verified that "total payments to Pontinox represent total LMI Italian sales of products under investigation *and* sales of other flat-rolled products." R. 758. LMI's documents did not permit Commerce to determine "which commission payments were made only on sales of the merchandise subject to investigation and which were paid on sales of merchandise not subject to investigation—even on a gross aggregate basis." *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record,* at 22.

Although Commerce found that LMI and Pontinox were related parties and LMI's documentation did not permit separate identification of commissions paid on sales of only the merchandise under investigation, LMI claims its payments to Pontinox satisfy the criteria established in the two prior determinations that Commerce cited as authority to deny the circumstance of sale adjustment: *Drycleaning Machinery from West Germany; Final Results of Administrative Review of Antidumping Finding,* 50 Fed. Reg. 32,154 (Aug. 8, 1985); and *Egg Filler Flats from Canada; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 24,009 (June 7, 1985).

Commerce allowed a circumstance of sale adjustment for commissions paid to individual salesmen in the *Drycleaning Machinery* review, because Commerce was satisfied that the payments to the salesmen

> were directly related to particular sales under review, in the form of percentages of the sales price of those sales. The percentages to be paid were detailed in contracts between the salesmen and the company.

50 Fed. Reg. at 32,155 (comment 7). Commerce also allowed an adjustment for commissions paid to a salesman in *Egg Filler Flats from Canada,* because Commerce determined that the salesman in question operated as an unrelated party:

> [A]lthough the salesman was an employee of the company, he received no salary; all payments to the salesman were directly related to particular sales, in the form of a percentage of the revenue accruing from those sales. The percentage to be paid was detailed in a contract between the salesman and the company. Additionally, the salesman paid for all of his sales-related

> expenses, with the exception of certain medical and other non-salary benefits. The cost of these benefits to the company was not included in the claim for the commission adjustment. Thus, the claimed adjustment for the commissions paid to the salesman cannot be considered to be part of the general costs * * *, since it is directly related to specific sales, and included no expenses which could not be tied to those sales.

50 Fed. Reg. at 24,010.

The Court finds a clear distinction between commission payments to individual salesmen and payments to wholly-owned corporate subsidiaries. A foreign producer could completely avoid a determination of sales at less than fair value merely by increasing the amount of its commission payments to its subsidiary company. An intra-company transfer of funds would not decrease the foreign producer's total revenue, but it could enable foreign corporations to sell in the United States at less than fair value. The Court affirms Commerce's denial of a circumstance of sale adjustment for commissions paid to LMI's wholly-owned subsidiary company.

2. *Salaries of Technical Service Personnel*

Commerce denied LMI's claimed circumstance of sale adjustment for technical service salary expenses incurred in the home market. Commerce stated that at verification,

> LMI was unable to demonstrate adequately that these salaries are directly tied to the sales in question. Therefore, the Department did not allow that portion of technical services attributable to salaries.

52 Fed. Reg. at 817 (Comment 2).

The stringent limit on circumstance of sale adjustments for technical service salaries was fully discussed in *Rhone Poulenc, S.A.* v. *United States,* 8 CIT 47, 592 F. Supp. 1318 (1984), where Commerce had sought evidence that the services were performed to carry out the sales transfactions at issue, rather than for other purposes such as basic research or promoting good will and future sales. The court found the distinction to be "critical given the statutory criteria for qualifying for a circumstance of sale adjustment," and that a "strict limit on adjustments for technical services is consistent with the basic purposes of the antidumping law":

> The antidumping law attempts to compare United States price and the foreign market value on as close to an equal basis as possible to determine whether the foreign manufacturer is charging a fair price in the export market * * *. [A]djustments to the United States price are limited to specific costs or benefits involved in the transaction that directly change the sale price. Therefore, adjustments to foreign market value must be similarly limited to provide a fair basis for comparison.
>
> If Rhone Poulenc's sales obligations in France specifically included providing goods and technical services, and if Rhone Poulenc's sales obligations in the United States only included

> providing goods, then there would be different circumstances of sale under consideration. But to the extent the technical services were provided for independent purposes such as basic research or promoting good will and future sales, it would be inappropriate to permit a circumstances of sale adjustment. Costs of basic research benefit both the domestic and export market. It would be unfair to adjust for such expenses in one market and not the other. Costs incurred during the period of investigation to promote good will relate to future sales and *ipso facto* do not directly relate to the sales under consideration.

Id. at 66–67, 592 F. Supp. at 1335. The record in *Rhone Poulenc* showed that the responsibilities of the technical services group were not merely directed toward assisting customers to use products sold during the period of investigation, but were in large part directed toward research and maximizing future sales by developing new product applications. The court found Commerce's determination to be "clearly correct" that technical salaries and related personnel expenses were not directly related to sales because the employees involved were Rhone Poulenc's permanent staff members:

> Salary and personnel expenses would have been incurred for these employees regardless of whether Rhone Poulenc made any sales at all during the period of investigation. There is no direct relationship between these expenses and the sales under investigation.

Id. at 67, 592 F. Supp. at 1335–36. The court recognized that adjustments might be allowed as being directly related to sales where, for example, workers are hired on a job basis to perform technical services and the manufacturer can "demonstrate which personnel expenses are incurred for the particular sales under investigation." *Id.*, 592 F. Supp. at 1336.

Commerce did not deny that LMI incurred technical service salary expenses in only its home market, but determined that LMI had failed to relate these expenses to sales of the brass sheet and strip under investigation. 52 Fed. Reg. at 817. Commerce did allow a portion of technical service expenditures attributable to travel expenses of technical personnel providing assistance at a customer's location. Commerce allowed these travel expenses "because the documents examined at verification support the claim that the travel and related expenses were directly related to sales of the products under investigation." 52 Fed. Reg. at 817.

LMI argues that because Commerce allowed an adjustment for the travel expenses of these technicians, Commerce must also make an adjustment for their salaries. LMI claims it is arbitrary for Commerce to find that the incidental expense of transporting a technician is directly related to sales of the merchandise under investigation, but that the provision of the services themselves is not directly related to sales of the merchandise under investigation.

The technical service positions were full-time salaried positions that did not differentiate brass sheet and strip under investigation and other LMI products. Although LMI claimed that the amount of time devoted by its salaried technicians to providing services to purchasers of brass sheet and strip products and to purchasers of other LMI products was "roughly equivalent," Conf. R. 629, Commerce determined that LMI could have reviewed its records to ascertain precisely the amount of technical service expenses directly related to sales of the merchandise under investigation. *See* R. 762–63; Conf. R. 524. LMI did not demonstrate to the satisfaction of Commerce that the services were provided pursuant to specific sales contracts or agreements. Rather, LMI indicated that the provision of technical services was simply a company "policy." Conf. R. 467.

Plaintiffs bear the burden of demonstrating to the satisfaction of Commerce that they are entitled to a circumstance of sale adjustment for expenses directly related to sales. 19 U.S.C. § 1677b(a)(4)(B) (1982 & Supp. V 1987); 19 C.F.R. § 353.15(a) (1988); *Rhone Poulenc, S.A.*, 8 CIT at 64, 592 F. Supp. at 1333. It is not the function of this Court to decide whether it would have made the same decision on the basis of the evidence contained in the administrative record. *See Matsushita Elec. Indus. Co.* v. *United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). The Court's role is to determine whether Commerce's determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982).

The Court finds that Commerce's denial of a circumstance of sale adjustment claimed for the technical service salaries is according to law and supported by the administrative record as a whole because LMI did not meet its burden of proving that the services were provided for the products under investigation.

3. *Pre-Sale Inventory Expenses*

LMI claims it should be allowed an adjustment for pre-sale inventory expenses related to home market sales. LMI contends that it maintains an inventory of merchandise solely to service the requirements of its customers in Italy. Sales of merchandise to the United States are made to order and, therefore, do not require warehousing.

Commerce disallowed the claimed adjustment because the financing costs "were incurred prior to sale and therefore, are not directly related to the sales in question." 52 Fed. Reg. at 818. In past investigations Commerce had uniformly disallowed circumstance of sale adjustments for pre-sale inventory or warehousing expenses where expenses could not be directly related to the sales under investigation, because the warehousing expenses would have been incurred even if no sales had been made. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan; Final*

Determintion of Sales at Less Than Fair Value, 52 Fed. Reg. 30,700 (Aug. 17, 1987).

The existence of a well-explained prior administrative practice does not relieve a court of its responsibility to determine whether that practice is consistent with the agency's authority. *Securities and Exchange Comm'n* v. *Sloan,* 436 U.S. 103, 118 (1978). In this regard, *Asahi Chem. Indus. Co.* v. *United States,* 12 CIT ——, 692 F. Supp. 1376 (1988), overturned Commerce's practice of disallowing pre-sale warehousing expenses for a single product. *Asahi* found that the requirement of linking the warehousing expenses of yarn to a particular sale in order to verify costs was more stringent than the regulation requires, and is thus contrary to law:

> There was no other evidence before Treasury which would refute plaintiff's claim that warehousing expenses were paid only for yarn produced for the home market. Defendant alleges that the warehousing expenses should not be allowed since plaintiff would have incurred them regardless of whether plaintiff made *any* sales in the home market. That reasoning, conjectural since plaintiff *did* make sales in the home market, would not hold up when the period of investigation is a period of twelve months, as it is here. Plaintiff is a going business entity and it is unlikely that it would continue to stockpile yarn if no domestic sales were generated over a year's time.

Id. at ——, 692 F. Supp. at 1379.

The warehousing expenses in *Asahi* were incurred for a single raw material used to manufacture the product under investigation. A different situation arises where pre-sales warehousing expenses are incurred on a variety of raw materials used to manufacture both the product under investigation and other products.

LMI states that "its inventory consists, *in part,* of merchandise produced to order for a customer from the customer's own copper and zinc." *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record,* at 50. Commerce found that while LMI incurred expenses to maintain the inventory of finished goods awaiting sale, LMI provided information as to only the "average cost of financing inventory during the period" in its questionnaire response. R. 310. At verification, LMI submitted documents which recorded inventory costs on an average monthly basis. Verification R. at 834–37.

It would be anomalous to the purposes of the antidumping statute if a foreign producer could offset its sales at less than fair value by claiming warehousing expenses for storage of not only materials used to manufacture the product under investigation and the finished product itself, but also the expenses of storing an unlimited variety of raw materials used to manufacture its entire product line and the expenses of storing finished merchandise other than that subject to investigation. The Court affirms Commerce's denial of a

circumstance of sale adjustment for LMI's average costs of financing inventory.

4. *Currency Hedging Expenses*

LMI engages in currency hedging for home market sales to cover foreign exchange exposure. R. 767. When LMI purchases copper and zinc for its manufacturing operations and pays for these raw materials in United States dollars for later sale in lira, LMI will purchase a forward contract to ensure the availability of dollars at the rate of exchange in effect when home market orders are placed. R. 767, 769; *Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record,* at 45. LMI states that its hedging practices are not a function of its purchases of raw materials, but are a function of its sales in Italy, and that LMI hedges its home market sales by purchasing forward currency contracts so that the value of those home market sales will not decline in dollar terms:

> If LMI did not hedge its home market sales, which are denominated in lira, the value of those sales in dollars would decline if the lira were depreciating, as it was during the period of investigation. This is important because LMI's raw material purchases occur in dollars. Hence, the dollar equivalent of LMI's home market sales in lira must be maintained if LMI is to sell profitably in its home market. By contrast, U.S. sales, which are denominated in dollars, never see their dollar value erode. Hence, U.S. sales always retain their dollar value relative to the dollar cost of raw materials.
>
> Because hedging is done to "lock in" the dollar value of home market sales it is a selling expense of those home market sales. It promotes the retention of value in dollars for home market sales. U.S. sales are not hedged. In dollars they will never decline in value. Hedging is not practiced to facilitate raw material purchases * * *. Hedging does no more than permit LMI to translate lira receivables into dollars so that the *actual proceeds of home market sales,* in dollars rather than lira, are fixed.
>
> Hedging, for LMI, is an expense incurred because it sells brass sheet and strip in Italy in lira, while buying copper and zinc in dollars. It is the sale in lira, not the purchases in dollars, that prompts LMI to hedge its home market sales. LMI hedges only its home market sales and does so at an identifiable cost. That cost causes home market sales to be more "expensive" and constitutes a difference in the circumstances of sale for which an adjustment should have been made.

Plaintiff's Reply to Defendant's and Defendant-Intervenors' Responses in Opposition, at 20–21.

Commerce denied an adjustment claimed for LMI's currency hedging expenses because those costs were related to LMI's general operations and not to the home market sales of the merchandise under investigation:

> Such risks exist with regard to the purchase of raw materials regardless of the destination of the final product. Therefore, these expenses must be viewed as general expenses to LMI, rather than selling expenses unique to the home market. Furthermore, even if these expenses were unique to the home market, they cannot be directly tied to the sales under investigation, and therefore, do not constitute an allowable circumstance-of-sale adjustment.

52 Fed. Reg. at 818.

The record shows that LMI imports copper and zinc "to keep a rolling stock on hand" which is drawn upon to manufacture all of the items in LMI's product line regardless of the ultimate destination of the product. R. 725–28. As the raw materials are essentially fungible, the zinc or copper could be withdrawn from the stockpiles and applied to either United States sales or home market sales in Italy. R. 727–28.

From the manner in which LMI maintains its inventories, LMI is unable to distinguish between the raw materials it purchases with hard currency earned from United States sales and that which it purchases on a currency hedging basis. It is not possible to determine whether the raw materials purchased with currency hedging were even used to produce the merchandise under investigation, because there is "no ear-marking of particular zinc or copper." R. 727.

Plaintiffs do not need to attribute each expense claimed to a particular sale in order to qualify for a circumstance of sale adjustment. *Rhone Poulenc, S.A.* v. *United States,* 8 CIT 47, 66, 592 F. Supp. 1318, 1334 (1984). The claimed expenses, however, "must be related to specific sales at issue—sales of certain products, during a certain period of time—rather than to sales generally." *Ipsco, Inc.* v. *United States,* 12 CIT ——, 687 F. Supp. 633, 642 (1988).

The Court finds that LMI did not meet its burden of proving to the satisfaction of Commerce that the currency hedging expenses were directly related to sales of the merchandise under investigation. Commerce's denial of a circumstance of sale adjustment for currency hedging expenses is supported by the administrative record as a whole and is according to law.

B. *Cost of Credit Based on Lira Borrowing Rate*

LMI claims that Commerce erred in calculating a cost of credit based on a short term lira borrowing rate in Italy rather than the prevailing interest rate in the United States. LMI urges that because the dollar borrowing rate at the relevant time was approximately 9.5%, as opposed to the approximate lira-based rate of 16%, common sense dictates that LMI would have obtained financing for its United States sales at the United States rate. LMI also argues that it is bound by an Italian law which was in effect for only a portion of the period under investigation. The law required all export sales involving credit which are invoiced in foreign currency to be financed with foreign currency loans. Ministerial Decree—Law of

Jan. 16, 1986, *Gazzetta Ufficiale della Republica Italiana* No. 13 (Jan. 17, 1986).

1. *Exhaustion of Administrative Remedies*

LMI admitted at oral argument that it did not raise the Italian credit financing law before Commerce. Administrative exhaustion of remedies is generally required before a litigant will be allowed to raise a claim via a civil action. *See* 28 U.S.C. § 2637(d) (1982); *Sharp Corp.* v. *United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988); *Alhambra Foundry Co.* v. *United States*, 12 CIT ——, 685 F. Supp. 1252, 1256 (1988); Cameron & Polino, *The Impact of the Court on ITA Policies and Procedures—Too Much or Too Little?*, 10 B.C. Int'l and Comp. L. Rev. 241, 242–50 (1987) (application of the doctrine of exhaustion of remedies in the Court of International Trade). LMI has failed to provide sufficient reasons for not raising the issue of Italian law prior to Commerce's determination. A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not previously presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action. *United States* v. *L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952); *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 155 (1946); *Rhone Poulenc, Inc.* v. *United States*, 13 CIT ——, Slip Op. 89–34, at 18 (Mar. 21, 1989). No exceptions to the exhaustion doctrine apply here. The Court finds that LMI should be precluded from raising for the first time in this Court the issue of whether Italian law bars the imputation of credit costs based on a lira-borrowing rate.

2. *Calculation of the Short-Term Borrowing Rate*

Commerce verified the existence of a lag time between the date of shipment and the date LMI received payment on its United States sales. Conf. R. 512–13. Because LMI does not specify credit costs or terms on its United States sales, Commerce found it necessary to impute this expense. Commerce explained the use of a lira-denominated short-term borrowing rate in calculating United States credit expenses:

> credit costs on U.S. purchase price sales were calculated by using the same short-term financing rate used to calculate credit costs in the home market.

52 Fed. Reg. at 818 (Comment 5). Commerce used this methodology to conform to an "established policy." *Id. See, e.g., Final Determination of Sales at Less Than Fair Value; Brass Sheet and Strip for the Republic of Korea*, 51 Fed. Reg. 40,833, 40,835 (Nov. 10, 1986).

LMI argues that because it is waiting for payment on United States sales, the imputed cost of credit should be based on a United States interest rate. LMI assumes that if it had borrowed money to finance its operations pending payment of accounts receivable, it

would have borrowed that money in the United States at a lower rate of interest.

Defendant states that it would normally be expected that a firm would seek a line of credit from one of its own financial institutions. In situations in which a firm has not accounted for the time value of money on outstanding receivables, Commerce generally inputes the credit expense based upon what it would have cost the firm to borrow in its home market for that type of sale.

LMI asserts that it had "dollar denominated short term financing available" which should have indicated to Commerce that LMI would have used dollar denominated short term financing for its United States sales. Commerce verified that LMI had "several U.S. dollar short-term loans outstanding during the period of investigation to finance purchases of imported raw materials." R. 749. Given the nature of these loans, however, defendant states that Commerce did not deem them to be indicative of the type of financing that LMI might have obtained for its export sales to the United States. With regard to LMI's United States export sales, LMI "had no dollar-denominated short-term loans outstanding during the period of investigation." *Id.*

The Court finds that Commerce's calculation of LMI's cost of credit for its accounts receivable, using a short-term rate available to LMI in Italy rather than a rate that LMI's United States customers might have obtained in the United States if LMI had not extended credit, is supported by the administrative record as a whole and is according to law.

II. *The Commission's Material Injury Determination*

LMI also challenges the Commission's final determination that a domestic industry in the United States is being materially injured by reason of less than fair value imports of brass sheet and strip from Italy as cumulated with dumped and subsidized imports from other countries, *Certain Brass Sheet and Strip from France, Italy, Sweden and West Germany,* Inv. Nos. 701–TA–270 and 731–TA–313, 314, 316 and 317 (Final), USITC Pub. No. 1951, at 17 (Feb. 1987), 52 Fed. Reg. 5839 (Fed. 22, 1987). LMI argues that (A) the Commission erred by cumulating Italian imports with other dumped or subsidized imports, and (B) no casual link between dumped imports and material injury to the domestic industry has been established.

A. *Cumulation*

LMI argues that in enacting 19 U.S.C. § 1677(7)(C)(iv) (Supp. V 1987), Congress did not seek to mandate cumulative analysis in all investigations involving more than a single country. LMI claims that less than fair value imports from Italy should not have been cumulated with less than fair value imports or subsidized imports from other countries because imports from West Germany were of a sufficient amount so that their impact on the domestic industry could be evaluated on their own without the need to cumulate other

imports, which, in comparison represented insignificant amounts. It claims that because West German imports represented from one-half to two-thirds of total import penetration throughout the period of review, the West German imports alone materially injure the domestic industry. LMI asserts that where a single country predominates in terms of import penetration, legislative intent would be frustrated if cumulation were to be permitted.

The starting point for interpreting a statute is the language of the statute itself, which will ordinarily be regarded as conclusive in the absence of a clearly expressed legislative intention to the contrary. *See Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The cumulation statute provides that for the purposes of evaluating volume and price effects,

> the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C. § 1677(7)(c)(iv) (Supp. V 1987).

The cumulation statute does not distinguish between imports of large and small volumes. The fact that dumped and subsidized imports compete with each other and with domestic like products in the United States market has been deemed to be sufficient to justify cumulation. *See Bingham & Taylor Div., Va. Indux.* v. *United States*, 815 F.2d 1482 (Fed. Cir. 1987); *Fundicao Tupy, S.A.* v. *United States*, 12 CIT ——, 678 F. Supp. 898, 902 (1988), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988); Mock, *Cumulation of Import Statistics in Injury Investigations before the International Trade Commission*, 7 Nw. J. Int'l L. & Bus. 433 (1986)

The plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. *United States* v. *Ron Pair Enterprises*, 109 S. Ct. 1026, 1031 (1989). Where Congress has clearly stated its intent in the language of a statute, a court should not inquire further, for the Court must give effect to the unambiguously expressed intention of Congress. *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988); *Brookside Veneers, Ltd.* v. *United States*, 847 F.2d 786, 788 (Fed. Cir.) *cert. denied*, 109 S. Ct. 369 (1988). Where the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's action is based on a permissible construction of the statute. *See K Mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *National Labor Relations Bd.* v. *United Food and Commercial Workers Union*, 484 U.S. 112 (1987). Furthermore, the Commission's interpretation of the statute need not be the only reasonable construction or the one the court would adopt had the question arisen initially in a judicial proceeding. *American Lamb Co.* v. *United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986).

LMI states the legislative history to the cumulation statute suggests that Congress sought to limit cumulation to instances where imports from individual countries were of such small magnitude that, viewed in isolation, injury could never be found. LMI states that where, as in this case, the facts clearly demonstrate the preeminence of a single country in terms of import penetration, legislative intent would be frustrated if cumulation were to be permitted. LMI cities language from the House Committee on Ways and Means Report on the Trade Remedies Reform Act of 1984, which become Title VI of the Trade and Tariff Act of 1984:

> The Committee amended the criteria to permit cumulation of imports from various countries that *each* account individually for a very small percentage of total market penetration, but when combined may cause material injury.

H.R. Rep. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5127, 5164 (emphasis added). LMI also cites language in the Committee Report on the Trade and Tariff Act, where the conferees stated that:

> The provision requires cumulation of imports from various countries that *each* account individually for a small percentage of total market penetration but when combined may cause material injury.

H.R. Rep. 1156, 98th Cong., 2d Sess. 173, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5220, 5290 (emphasis added).

LMI argues that these statements evidence a legislative intent that the cumulation statute apply only where imports from each of several countries accounts individually for a very small or insubstantial percentage of penetration and cannot be cumulated with imports from a country which accounts for a substantial percentage of the import penetration.

While the legislative history cited might be characterized as ambiguous, the language of the cumulation statute itself does not exclude smaller volumes of imports from cumulation with larger volumes. When the plain language of the statute appears to settle the question presented, the court looks to the legislative history to determine only whether there is a "clearly expressed legislative intention" contrary to the plain language which would require the court to question the strong presumption that Congress expresses its intent through the language it chooses. *See Immigration and Naturalization Serv.* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *United States* v. *James*, 478 U.S. 597, 606 (1986); *Madison Galleries, Ltd.* v. *United States*, slip op. 88–1559, at 11 (Fed. Cir. Mar. 8, 1989). The Court finds that there is no clearly expressed legislative intention to contravene the plain language of the statute.

The record shows that as a percentage of the imports in this investigation, the Commission could find it appropriate to include the Italian imports in the cumulative analysis. Conf. R. Doc. 73 at 74.

The fact that the level of Italian imports is substantially less than the level of West German imports is an insufficient basis upon which to justify exclusion of Italian imports from the Commission's cumulative injury analysis under 19 U.S.C. § 1677(7)(c)(iv) (Supp. V 1987). Under the circumstances of this case, the Court finds that the Commission could determine that Congress intended to include imports of this level in a cumulation analysis. *See American Lamb*, 4 Fed. Cir. (T) at 54, 785 F.2d at 1001.

The Omnibus Trade and Competitiveness Act of 1988 amended the cumulation statute to provide that the Commission is not required to cumulate imports in cases where the Commission determines that the imports subject to investigation are negligible and have no discernable adverse impact on the domestic industry. Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, § 1330(b), 102 Stat. 1107, 1207 (1988). *See also* H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 130–31 (1987). The changed law does not affect this case because the amendment applies only to investigations initiated after August 23, 1988. Omnibus Trade and Competitiveness Act of 1988, P.L. 100–418, § 1337(c), 102 Stat. 1107, 1211 (1988).

B. *Causation of Material Injury*

The Commission determined that the domestic industry is materially injured by reason of less than fair value imports from France, Italy, Sweden, and West Germany, and subsidized imports from France. USITC Pub. 1951, at 17. LMI does not contest the Commission's determination that the domestic industry is experiencing material injury, but argues that no causal link exists between the cumulated imports and the injury to the domestic industry because (i) increases and decreases in dumped imports parallel increases and decreases in domestic sales; (ii) the decline in domestic nontoll prices paralleled a decline in import nontoll prices; and (iii) the increases and decreases in import volume parallel increases and decreases in domestic volume.

In determining material injury by reason of imports under investigation, the Commission is not to weigh causes of injury, but is to determine whether imports contribute to conditions of the domestic industry. *See, e.g., British Steel Corp.* v. *United States*, 8 CIT 86, 96, 593 F. Supp. 405, 413 (1984). It is sufficient that the imports contribute, even minimally, to material injury. *Citrosuco Paulista, S.A.* v. *United States*, 12 CIT ——, 704 F. Supp. 1075, 1101 (1988); *Gifford-Hill Cement Co.* v. *United States*, 9 CIT 357, 368, 615 F. Supp. 577, 586 (1985).

In this investigation, the Commission cumulatively assessed the volume and effect of imports from Brazil, Canada, France, Italy, Korea, Sweden, and West Germany. USITC Pub. 1951, at 13. The Commission found that the volume of imports followed the trend in domestic consumption—rising sharply from 1983 to 1984 and then de-

clining. *Id.* at 13–14. Cumulated imports accounted for 15.6 percent of apparent domestic consumption in 1983, 21.0 percent in 1984, and 18.7 percent in 1985 and interim 1985. *Id.* at 14, A53 (staff report at table 20). Discounting the interim 1986 figures which reflected the impact of the investigations on brass imports, the Commission found that imports have taken an increasing market share since 1983. *Id.* at 14, A53 (table 20). The Commission found cumulated imports to have risen more rapidly relative to domestic shipments than apparent consumption, which indicated that "the domestic industry has lost relative market position to the cumulated unfairly traded imports with the resulting loss in sales of the product and the revenues that would have been derived from such sales." *Id.* at 14. The Commission also found that the overall market share held by the cumulative imports was significant throughout the period of investigation. *Id.* at 13 (citing *Certain Brass Sheet and Strip from Brazil, Canada, and the Republic of Korea*, Inv. Nos. 701–TA–269 (Final) and 731–TA–311 (Final) and 731–TA–311, 312, and 315 (Final), USITC PUb. 1930, at 14 (Dec. 1986)).

To examine the impact of prices of the "substantial volumes of imports" on prices in the United States for like products, the Commission asked producers and importers to provide price data on nine brass sheet and strip products for nontoll and toll account sales for the quarters between January, 1983 and September, 1986. *Id.* at 14. toll sales refer to metal-conversion contracts where the purchaser supplies the raw metal to the brass mill and, therefore, pays the mill for only the fabrication costs. *Id.* at 14, A56. Sales of imported brass sheet and strip on a toll account basis are rare, however, and a purchaser who wanted to buy imported brass on a toll account basis would have to arrange to purchase the metal and have it delivered to the foreign producer. *Id.* at A56 & n.3.

The Commission found that the price data for toll sales showed that weighted-average prices generally increased from 1983 to 1985 for three brass products, accompanying both a rising market in 1984 and a falling market in 1985. *Id.* at 15, A60–62. Although prices declined in 1986 for two products, one of them remained above January–March 1983 levels and the other fell below that level by only one cent per pound. *Id.* at 15, A61 (staff report at table 21).

The Commission found that generally rising domestic prices for toll account sales contrasted with the nontoll account market, in which the Commission found competition from imports. *Id.* at 15. For three products, prices peaked in 1984 and then declined. *Id.* at 15, A63 (staff report at table 22). Two of these nontoll products were identical to the toll products, and the Commission found decreasing price trends for nontoll account sales predated the price declines for toll accounts by at least one year. *Id.* at 15. Thus, the Commission determined that the cumulative imports "are a significant factor in

the trends in price divergences between toll account and nontoll account sales." *Id.*

For the nine brass products the Commission found that the nontoll account sales showed underselling by imports in the majority of instances where price comparisons were possible, with the highest level of underselling from Italian imports. *Id.* at 15, A67. For Italian imports, the Commission found underselling in all of the 30 direct comparisons. *Id.* at 16, A67. The Commission also discussed evidence of domestic sales lost to imports because of price, and its conclusion that price played an important role in purchasing decisions. *Id.* at 16, A84–87, Memorandum from the Office of Economics to the Commission, EC–K–042 (Fed. 6, 1987).

> Based on the evidence cited, the Commission found that the significant price underselling of the domestic product by the cumulated imports and the lost sales information lead us to conclude in these investigations that there has been significant price depression by the cumulated imports from Brazil, Canada, France, Italy, Korea, Sweden and West Germany. This conclusion is buttressed by the facts that the cumulated imports competed almost exclusively for nontoll account sales and that price declines in the toll market are significantly later than in the nontoll account market. Finally, * * * the cumulated imports have taken an increasing share of the domestic market. As a result, the cumulated imports have had an adverse material impact on domestic production and shipments and on domestic sales and profitability.

USITC Pub. 1951, at 16–17.

Congress vested the Commission with broad discretion in analyzing import volume in both absolute and relative terms. 19 U.S.C. § 1677(7)(C)(i); *Copperweld Corp.* v. *United States*, 12 CIT ——, 682 F. Supp. 552, 570 (1988). It is not this Court's function on review to reweigh evidence. *Citrosuco Paulista, S.A.* v. *United States*, 12 CIT ——, 704 F. Supp. 1075, 1093 (1988); *Alberta Pork Producers' Mktg. Bd.* v. *United States*, 11 CIT ——, 669 F. Supp. 445, 449 (1987). The Commission found that the cumulative volume of imports rose and was significant throughout the period of investigation and that there had been significant underselling and price depression by cumulated imports, resulting in a material adverse impact on domestic production and shipments and on domestic sales and profitability. USITC Pub. 1951, at 13–17. The Court finds that the Commission's material injury determination is supported by substantial evidence on the record as a whole and is according to law.

CONCLUSION

Commerce's denial of circumstance of sale adjustments and Commerce's construction of a cost of credit borrowing rate are found to be according to law and supported by substantial evidence on the record as a whole. The Commission's material injury determination

is supported by substantial evidence on the record and is according to law.

(Slip Op. 89–47)

THYSSEN STEEL CO., SOUTHWESTERN DIVISION OF THYSSEN INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, THE COMMITTEE OF DOMESTIC STEEL WIRE ROPE AND SPECIALTY CABLE MANUFACTURERS, DEFENDANT-INTERVENOR

Court No. 88–12–00944

[Defendant's and defendant-intervenor's motions to dismiss are granted.]

(Decided April 13, 1989)

Windels, Marx, Davies & Ives (*Jonathon R. Moore*) for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Al J. Daniel, Jr.*) for defendant.

Harris & Ellsworth (*Herbert E. Harris, II* and *Cheryl Ellsworth*) for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* The present action is before the Court on plaintiff's (Thyssen Steel Co., Southwestern Division of Thyssen Inc.) 56.1(e) motion for judgment upon the agency record regarding Treasury Decision 88–78, 22 Cust. Bull. 1, 53 Fed. Reg. 49,117 (Dec. 6, 1988), which changed the tariff classification of certain wire rope with becket attachments or becket loops. Defendant, United States, and defendant-intervenor, The Committee of Domestic Steel Wire Rope and Specialty Cable Manufacturers, have moved to dismiss for lack of jurisdiction pursuant to USCIT Rule 12(b)(1). Oral argument was had on the jurisdictional issue on February 9, 1989. Due to the potential hardship to plaintiff, the Court ordered an expedited litigation schedule.

BACKGROUND

Plaintiff seeks to challenge the change in tariff classification of the subject merchandise by the United States Customs Service (Customs) in Treasury Decision 88–78.[1] The ruling reclassifies the subject merchandise as steel rope not fitted with fittings, item 642.16, Tariff Schedules of the United States (TSUS), or if of stainless steel, under 642.14, TSUS. The new classification[2] results in the benefit of a lower rate of duty for the merchandise,[3] but also makes the prod-

[1]The ruling became effective on January 20, 1989, 30 days after publication. T.D. 88–78. Notice of the proposed rule was published on October 1, 1987. 52 Fed. Reg. 36,789.

[2]The merchandise had originally been classified under item 642.20, TSUS, as wire ropes, cable or cordage fitted with hooks, swivels, clamps, clips, thimbles, sockets or other fittings.

[3]Four percent ad valorem if classified under 642.16, TSUS, 4.4% ad valorem if classified under 642.14, TSUS, as opposed to 5.7% ad valorem under the previous classification, 642.20, TSUS.

uct subject to voluntary restraint arrangements (VRA), which prohibit the importation without visas of certain steel products from the European Community.[4] Pursuant to the VRAs, plaintiff is allocated a certain amount of quota based on its prior sales to the United States, and has the option of purchasing additional unused quota from other suppliers. Plaintiff claims the Court has jurisdiction to entertain the challenge under 28 U.S.C. § 1581(h) and/or § 1581(i).

DISCUSSION

Section 1581(h)

This Court may review a ruling issued by the Secretary of Treasury relating to the classification of merchandise when the importer has demonstrated that "he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation." 28 U.S.C. § 1581(h);[5] *see also Manufacture de Machines du Haut-Rhin* v. *von Raab,* 6 CIT 60, 63, 569 F. Supp. 877, 880–81 (1983).

Section 1581(h) has four requirements to invoke its jurisdiction:

> (1) judicial review must be sought *prior* to importation of goods;
> (2) review must be sought of a ruling, a refusal to issue a ruling or a refusal to change such ruling;
> (3) the ruling must relate to certain subject matter; and
> (4) irreparable harm must be shown unless judicial review is obtained *prior to* importation.

American Air Parcel Forwarding Co. v. *United States,* 2 Fed. Cir. (T) 1, 7, 718 F.2d 1546, 1551–52 (1983), *cert. denied,* 466 U.S. 937 (1984) (emphasis in original); *National Juice Products Ass'n* v. *United States,* 10 CIT 48, 51, 628 F. Supp. 978, 982 (1986).

The first three requirements are not disputed. The only jurisdictional issue regarding § 1581(h) is whether plaintiff will suffer irreparable harm should it not obtain judicial review. Since defendant has challenged jurisdiction under § 1581(h), plaintiff has the burden of demonstrating that jurisdiction exists. *National Juice,* 10 CIT at 51, 628 F. Supp. at 982; *Lowa, Ltd.* v. *United States,* 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd,* 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984).

Plaintiff contends that adhering to the ordinary protest procedure under § 1581(a), which requires the exhaustion of remedies pursuant to 19 U.S.C. §§ 1514 and 1515, would cause its business ir-

[4]The applicable VRAs are agreements between the United States and certain steel producing countries, such as the Republic of South Korea, Japan and the European Economic Community, to voluntarily limit exports to the United States of certain basic steel products. T.D. 88–78. The imports of the steel products are not entitled to admission into the United States unless accompanied by the necessary visa. *Id.*

[5]Section 1581(h) reads as follows:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

reparable harm due to the delay inherent within that procedure, even if it used the expedited schedule available in 19 C.F.R. § 174.22 and 19 U.S.C. § 1515. The peculiar nature of the product, plaintiff continues, requires substantial lead time in ordering the merchandise from manufacturers.[6] According to plaintiff, this substantial lead time necessitates placing orders immediately so as to avoid possible business disruption. Filling current orders is unlikely, plaintiff states, because of the inadequate supply of VRA quota, and customers must be assured of a continuous supply of drag and hoist lines or they will seek other suppliers.[7] Once these customers are lost, plaintiff submits that it will not be able to reacquire their business; hence, the irreparable injury.

Without a clear showing of irreparable injury, failure to exhaust administrative remedies will serve as a bar to judicial intervention in the administrative process. *American Institute for Imported Steel, Inc.* v. *United States,* 8 CIT 314, 317, 600 F. Supp. 204, 208 (1984). Business disruption resulting from the delay of exhausting the administrative process demonstrates irreparable harm in some instances. *See 718 Fifth Avenue Corp.* v. *United States,* 7 CIT 195, 198 (1984); *National Juice,* 10 CIT at 54, 628 F. Supp. at 984; *Tropicana Products, Inc.* v. *United States,* 3 CIT 171, 175–76, *modified,* 3 CIT 240 (1982). Plaintiff, however, must set forth sufficient documentation to support its allegations in establishing the threat of irreparable harm. *718 Fifth Avenue,* 7 CIT at 198 (citing *Di Jub Leasing Corp.* v. *United States,* 1 CIT 42, 505 F. Supp. 1113 (1980)). Plaintiff bears a heavy burden in producing this evidence. *American Institute,* 8 CIT at 318, 600 F. Supp. at 209.

Plaintiff in the instant action has not met this burden. It has not put forth satisfactory evidence reflecting the unavailability of quota or its inability to supply customers with drag and hoist lines. The only evidence presented was an affidavit by Mr. Wesslen, who stated that "Thyssen has continued to make inquires concerning the possibility of purchasing additional quota, and has found that no excess quota is currently available for purchase * * *." Wesslen Affidavit at ¶ 20. Plaintiff has not introduced witnesses, proofs or affidavits from any other source indicating that it has attempted to purchase quota but failed, or that sellers would not be willing to part with a portion of their allotted quota. "Where irreparable injury is not demonstrated by 'probative evidence' " extraordinary relief should not be granted. *Id.* at 318, 600 F. Supp. at 209.

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[6]Mr. Johan Wesslen, Vice-president of Thyssen Steel Co., stated that "[t]hese lead times can be as short as 8 weeks where stock is available at the mill on master reels, which need to be cut to length and fitted with welded links or ferrule becket loops before shipment. If inventory is not available on master reels at the mill, however, it can take 5 months or longer for an order to be delivered because the wire rope itself must be manufactured." Wesslen Affidavit at ¶ 3.

[7]Plaintiff avers that the approximate life expectancy of drag lines and hoist lines is three and six months respectively, but that these lines can break at any time. Plaintiff claims to typically maintain three back-up sets of drag lines and two back-up sets of hoist lines; and if a hoist line broke immediately, it would have to order immediately in order to avoid disruption. The continuous supply is critical, plaintiff continues, due to the high cost of down-time ($3,000 to $10,000 per hour) on surface mining machines on which plaintiff's products are used. *See* Wesslen Affidavit at ¶¶ 5 and 6.

Moreover, plaintiff has not demonstrated that regardless of quota availability, the threat of irreparable harm is actual and imminent. Plaintiff assumes that it will not be able to meet its customers' needs but has not put forth appropriate documentation to support that conclusion. "A presently existing, actual threat must be shown." *S.J. Stile Associates Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981); *National Juice,* 10 CIT at 53, 628 F. Supp. at 984. The mere possibility of injury, even where prospective injury is great, is not sufficient to justify court intervention. *S.J. Stile,* 68 CCPA at 30, 646 F.2d at 525.

Whatever harm plaintiff actually suffers is due to its own lack of good business judgment. It was well aware, in advance, of Customs' intention to alter the subject merchandise's classification under the TSUS, yet, took no steps in anticipation of the proposed change. Customs published notice of the proposed ruling on October 1, 1987, more than a year prior to the final reclassification of the merchandise. 52 Fed. Reg. 36,789. Plaintiff's attempt to justify this inaction is unacceptably feeble: that prudent business judgment dictated not relying on the proposed reclassification because "Customs' 'track record' for elapsed time in publishing a 'final rule' after issuing notice of the proposed rule was between 10 to 21 months." Plaintiff's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction and to Intervenor-Defendant's Motion to Dismiss for Lack of Jurisdiction and to Stay the Proceeding at 19 [hereinafter "Plaintiff's Memorandum"]. The Court does not believe a prudent businessperson would have acted in such a manner. *See, e.g., American Air Parcel,* 2 Fed. Cir. (T) at 6, 718 F.2d at 1551 (importers aware prior to importation that the basis for valuation was disputed yet entered transactions placing themselves in a precarious position).

Furthermore, the type of harm plaintiff may suffer as a result of the reclassification of its merchandise is not the type of harm contemplated by § 1581(h). This court has explicitly stated that

> [t]he irreparable harm contemplated by section 1581(h) is the harm that may be visited upon an importer by requiring the importation of merchandise and requiring the importer to go through the administrative process * * *. [*It is not the] harm resulting from the exclusion of merchandise—lost profits, lost opportunities to make agreements for sale of its product, lost goodwill, and tarnished good name.*

Manufacture de Machines, 6 CIT at 63, 569 F. Supp. at 881 (emphasis added).

Plainly, the harm asserted by plaintiff here fits squarely within the definition of harm outlined above, *i.e.,* lost profits, lost good will, and tarnished good name.[8] "If the adverse effect of receiving an un-

[8] *See also Arbor Foods, Inc.* v. *United States,* 8 CIT 355, 359, 600 F. Supp. 217, 220 (1984), where the court held that there was no showing of irreparable harm when plaintiff alleged injury in the form of lost sales, lost benefits from past marketing, injury to its reputation as a reliable supplier, and the costs required for developing new products.

favorable ruling was sufficient alone to establish irreparable harm, then any importer aggrieved by a ruling could invoke this court's declaratory judgment jurisdiction." *718 Fifth Avenue,* 7 CIT at 197. Plaintiff is not irreparably harmed by a binding agency ruling contrary to its position. *Id.* (citing *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 687 F.2d 467 (1982)). To reiterate, plaintiff was aware of Customs' consideration to reclassify the merchandise and had the opportunity to adjust its business in anticipation of the issuance of T.D. 88–78, but neglected to take any action.

The Court is cognizant that evidence of substantial harm to business good will, business reputation and a significant loss of new business has been held to constitute irreparable injury. *See American Customs Brokers Co.* v. *United States,* 10 CIT 385, 637 F. Supp. 218 (1986); *Mutual of Omaha* v. *Novak,* 775 F.2d 247, 249 (8th Cir. 1985) (irreparable injury found based on injury to business reputation and good will arising from alleged trademark infringement); *National Juice,* 10 CIT at 54, 628 F. Supp. at 984 (the suppliers were unable to provide the necessary labels and cans by the effective date of a Customs Service Decision, and the unavailability of such packaging would have resulted in the inability to fill orders placed by retail customers. The transition to packaging complying with the new ruling would take a year to two and one-half years); *Lois Jeans & Jackets, U.S.A.* v. *United States,* 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (irreparable injury was found when defendants actions resulted in the loss to plaintiff of past and future sales, injury to plaintiff's reputation as a reliable supplier, and potential costs required for altering plaintiff's production methods). However, in each of those actions, the plaintiff had adequately documented its allegations of irreparable harm. Plaintiff here has made no commensurate showing.

On the face of this evidence and absent a more explicit representation, the Court cannot conclude that plaintiff has met its burden,[9] therefore, the Court cannot find jurisdiction under § 1581(h).

Section 1581 (i)

Section 1581(i) in broad language "grants the court residual jurisdiction of any civil action arising out of the enforcement or administration of the customs laws * * *." *Lowa,* 5 CIT at 87, 561 F. Supp. at 446. Where a litigant has access to the court by traditional means, such as under 1581(a), it must avail itself of that avenue of approach and comply with all relevant prerequisites. It cannot circumvent these prerequisites by invoking jurisdiction under § 1581(i), unless the remedy provided under another subsection of § 1581 would be manifestly inadequate, *Miller & Co.* v. *United*

[9] *Cf. American Institute,* 8 CIT at 318, 600 F. Supp. at 209 (plaintiff produced no evidence that additional injuries would occur, made no showing that delays of less than a month would violate the terms of any contract, made no showing that time was the essence of any contract, and made no showing that they could not substitute other steel products either from their own inventories or from other sources and thereby eliminate potential customer dissatisfaction).

States, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied,* 108 S.Ct. 773 (1988) (citing *United States* v. *Uniroyal, Inc.,* 69 CCPA 179, 187, 687 F.2d 467, 475 (1982) (Nies, J., concurring)), or "when necessary, because of special circumstances, to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Lowa,* 5 CIT at 88, 561 F. Supp. at 447; *American Ass'n of Exporters* v. *United States,* 7 CIT 79, 84, 583 F. Supp. 591, 596 (1984), *aff'd,* 3 Fed. Cir. (T) 58, 751 F.2d 1239 (1985). Recourse to 19 U.S.C. § 1514 and § 1515 for the exhaustion of administrative remedies is not required when it would be futile. *United States Cane Sugar Refiners' Ass'n* v. *Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887, *aff'd,* 69 CCPA 172, 683 F.2d 399 (1982). The party asserting § 1581(i) jurisdiction has the burden to demonstrate the manifest inadequacy of the remedy under the other subsections. *Miller,* 824 F.2d at 963.

Plaintiff demands recourse through § 1581(i) because it believes that going through the normal administrative procedure would be "hopeless and futile." The basis of plaintiff's belief is that the issues herein have already been decided by the highest levels of Customs and Treasury in their decision to revoke Ruling 808452, by T.D. 88–78.[10] Therefore, plaintiff concludes that as a practical matter, no protest filed would be sustained. Plaintiff relies on the decisions in *Springfield Industries Corp.* v. *United States,* 12 CIT ——, 655 F. Supp. 506 (1987) and in *United States Cane Sugar,* 69 CCPA 172, 683 F.2d 399, as authority for jurisdiction under § 1581(i).

In *Springfield,*[11] the court rejected the government's suggestion that plaintiff exhaust its administrative remedies under § 1581(a), holding that since the Treasury Department had directed the conduct of the Customs Service, Customs was powerless to alter the classification of the merchandise. 12 CIT at ——, 655 F. Supp. at 507. The court concluded that the classification of the involved articles was "preordained" and any subsequent protest against the classification would be "hopeless and the exhaustion of administrative remedies would be futile." *Id.*

In *United States Cane Sugar,* plaintiff challenged the validity of a presidential proclamation which established country-by-country import quotas on sugar, and limited the total amount of sugar imported. The court refused to require the plaintiff to exhaust administrative remedies, finding that the Customs officials were legally foreclosed from granting the relief sought at the administrative level since the Customs officials who would review a protest would have

[10]Ruling 808452 classified the subject merchandise under item 642.20, TSUS, and plaintiff claims to have "prepared and filed exhaustive briefs in support of an affirmation" of the ruling before various Customs officials. *See* Plaintiff's Memorandum at 3–4.

[11]Plaintiff, importer of wire strand from South Africa, sought injunctive and declaratory relief under § 1581(i) against the inclusion of its product within the class of goods prohibited from importation under Section 320 of the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99–440, 100 Stat. 1086, (1986), as amended by House Joint Resolution 756, Pub. L. No. 99–631, Oct. 18, 1986. 12 CIT at ——, 655 F. Supp. at 507. Plaintiff, there, claimed that "[t]he Treasury Department acted unlawfully when, in issuing regulations to enforce the provision of the Act that no steel produced in South Africa be imported into the United States, it included products classifiable under" the applicable TSUS provision which included plaintiff's merchandise. *Id.*

no authority to override a presidential proclamation. 3 CIT at 201, 544 F. Supp. at 887.

Plaintiff perceives *Springfield* and *United States Cane Sugar* to be controlling in the case at bar. However, the common thread between *Springfield* and *United States Cane Sugar* is absent in the instant action. In those cases, Customs had no power to alter the directive from the higher authority. Here, Customs does have the authority to reconsider and reverse its determination. It was the Customs Service that reclassified the merchandise and it is the Customs Service which can reverse the prior decision. *See* 19 C.F.R. § 174.26(b)(1)(iii). Therefore, review at the administrative level would not be "hopeless and futile." "[T]he fact that plaintiff may not succeed in its claim at the administrative level does not justify noncompliance with the statutory scheme enacted by Congress." *Wear Me Apparel Corp.* v. *United States*, 1 CIT 194, 198, 511 F. Supp. 814, 818 (1981). Plaintiff has made no showing that jurisdiction under § 1581(i) is warranted. Thus, the Court finds that jurisdiction is lacking.

(Slip Op. 89–48)

FLORAL TRADE COUNCIL OF DAVIS, CALIFORNIA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND ASOCIACION COLOMBIANA DE EXPORTADORES DE FLORES, DEFENDANT-INTERVENOR

Court No. 88–10–00822

[Plaintiff's motion granted in part; briefing to proceed on the basis of the proposed supplemental record.]

(Decided April 17, 1989)

Stewart & Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Jimmie V. Reyna*), for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Elizabeth C. Seastrum*), Civil Division, United States Department of Justice, for defendant.

Arnold & Porter (*Patrick F.J. Macrory*) for defendant-intervenors.

OPINION AND ORDER

RESTANI, *Judge:* The court's opinion herein of March 24, 1989, Slip Op. 89–39, provides the relevant background in this matter. Essentially, plaintiff seeks to supplement the record as filed by the agency. Defendant is opposed to such action. In its earlier opinion the court found that at least one document which was specifically mentioned by the agency in its determination was not included in the record. In addition, the agency determination referenced entire records of previous proceedings. Such records were not included here in the official record as filed by the agency. Therefore, the

court directed plaintiff to file a list of the documents from those referenced records which it contended should be added to the administrative record. Defendant was permitted to respond on relevancy grounds.

Instead of objecting on whatever relevancy grounds it might have, defendant objected to the proposed additions on the ground that the determination at issue here contained a misstatement as to the materials which were obtained by the agency in connection with the proceedings at issue.[1] Not only did defendant fail to explain which of the listed documents did not fit its revised description of the materials obtained by the agency, but the court must be somewhat cautious about allowing the agency, in essence, to alter the words of its determination at such a late stage.

Defendant alleges further that the court may not determine "on its own" the composition of the administrative record. Defendant's objection at 5–6. The court is unclear as to the meaning of this contention. Obviously, the agency has been given an opportunity to file the proper record. It is only after finding a failure of the agency to understand the proper scope of the record that the court has permitted supplemental filings. Surely defendant does not contend that the composition of the record is a matter beyond judicial review. If it does so contend, it has not provided any support for such a proposition.

Given the late assertion of a misstatement in the agency determination, and the lack of explanation as to which of the proposed documents do not fit defendant's new general description of documents reviewed by the agency, the court believes this matter may be most expeditiously considered by allowing plaintiff to make its case based on the proposed record as supplemented. As it is unlikely that the court will hear arguments which were not first presented in some fashion to the agency, the proposed addition to the record most likely will simply provide a broader picture of the information before the agency, Thus, it is possible that the proposed supplementation of the record will be of minor significance. In any case, as little explanation as to the import of defendant's "correction" of the description of the materials obtained by the agency has been provided, the court declines to waste attorney and judicial resources in an effort to determine what was actually meant by the language of the determination, which language indicated that records of prior investigations had been reviewed. Based on the filings before the court to date, the court finds no reason to preclude plaintiff from at least explaining to the court why it believes the agency erred based on the proposed record.

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[1]The record for purposes of judicial review consists of documents "presented to or obtained by" the agency in connection with the determination under review. 19 U.S.C. § 1516a(b)(2)(A) (1982). It is agreed that the documents at issue were not "presented to" the agency by plaintiff. The court in the previous opinion held, however, that documents referenced to by the agency in the determination fall within the general category of "presented to or obtained by" the agency for purposes of review of the determination.

(Slip Op. 89–49)

UNITED STATES, PLAINTIFF *v.* DAEWOO INTERNATIONAL (AMERICA) CORP. AND DAEWOO CORP., DEFENDANTS

Court No. 87–03–00528

[Plaintiff's motion to waive "the 100-mile rule" contained in Rule 45(e) of the Rules of the United States Court of International Trade denied.]

(Dated April 18, 1989)

John R. Bolton, Assistant Attorney General; *General M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson, A. David Lafer* and *Martha Reis*) for plaintiff.

Milbank, Tweed, Hadley & McCloy (*Edward J. Reilly, Toni C. Lichstein* and *Richard D. Cleary*) for defendants.

MEMORANDUM ORDER AND OPINION

TSOUCALAS, *Judge:* Plaintiff moves for a waiver from enforcement of "the 100-mile rule" under Rule 45(e) of the Rules of the United States Court of International Trade (USCIT). Defendants oppose the motion.

BACKGROUND

The facts surrounding this 19 U.S.C. § 1592 (1982) action are outlined in *United States of America* v. *Daewoo Int'l (America) Corp. and Daewood Corp.*, 12 CIT ——, slip op. 88–130 (Sept. 29, 1988), *modified*, 12 CIT ——, slip op. 89–10 (Dec. 12, 1988). A partial summary judgment was entered therein in favor of plaintiff as to nine entries of steel and steel products imported into the United States. The remaining issues will be the subject of a trial which is tentatively scheduled to commence on June 27, 1989. Plaintiff seeks service of trial subpoenas on witnesses who reside beyond the 100-mile radius of the location of the trial.

DISCUSSION

Rule 45(e) of the Rules of this Court specifies the geographic reach of this Court's subpoena power as follows:

> (1) * * * A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

Under this rule, the subpoena power of this Court extends to any place within a 100-mile radius of the hearing or trial situs. In the absence of some statutory provision,[1] individuals outside this range

[1] *See, e.g.*, 15 U.S.C. § 23 (1982) (national subpoena power in suits by United States under antitrust laws); 38 U.S.C. § 784 (1982) (national subpoena power in actions against United States on veterans' insurance contracts). The 100-mile limit does not apply in bankruptcy actions as to a bankrupt or an officer or director of a corporate bankrupt. *See In re Totem Lodge & Country Club, Inc.*, 134 F. Supp. 158 (S.D.N.Y. 1955).

cannot be compelled to attend and testify. The remedy as to persons who will not attend voluntarily is to take depositions and substitute these for live testimony.

Plaintiff asserts it "intends to subpoena witnesses from various locations throughout the United States, including approximately twenty witnesses from California, ten witnesses from Texas or Louisiana, and several witnesses from Oregon and Washington. *None of the witnesses we currently contemplate subpoenaing for trial reside within 100 miles of New York.*" [*Plaintiff's Memorandum in Support of] Motion to Waive 100-Mile Rule* at 3 (emphasis in original) (*Plaintiff's Memorandum*). According to plaintiff, the sum and substance of responses from some of the witnesses during their depositions were the following: " 'I don't know,' 'I don't remember,' 'I don't recall,' and 'That's not my job.' " *Id.* at 6. Stressing the inadequacy of these depositions, plaintiff argues "the interests of justice require the waiver of the 100-mile rule," *id.* at 7, so that the members of the jury may receive the full benefit of live testimony.

In this context, plaintiff contends 28 U.S.C. §§ 2641(a) and 2643(b)(1982)[2] empower this Court to provide the relief for which it petitions. These statutory provisions pertain to the litigants' ability to examine and cross-examine witnesses and this Court's power to provide appropriate relief. Insofar as plaintiff's assertions as to the value of the witnesses it "contemplates subpoenaing" for the purpose of proving the Government's case and the worth of these individuals' depositions remain speculative, these provisions lack sufficient basis to support the comprehensive extension of subpoena power plaintiff seeks at this phase in the litigation. The Court cannot even determine from the motion whether plaintiff seeks to have subpoenas issued to some or all of the witnesses. The statutory provisions plaintiff cites may provide adequate grounds for service of subpoenas 100 miles beyond the place of trial at some later point if exigent circumstances are shown to exist or if in the public interest. In such a situation, the statutory prerequisite in Rule 45(e) "shall be construed to secure the just, speedy, and inexpensive determination" pursuant to Rule 1 of the Rules of the USCIT.

Defendants' claim that the Court is bound by the federal courts' rigid adherence to their circumscribed subpoena power is inapplicable for several reasons. As defendants state, the federal courts,

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[2] 28 U.S.C. § 2641 reads in part:

§ 2641. Witnesses; inspection of documents

(a) Except as otherwise provided by law, in any civil action in the Court of International Trade, each party and its counsel shall have an opportunity to introduce evidence, to hear and cross-examine the witnesses of the other party, and to inspect all samples and papers admitted or offered as evidence, as prescribed by the rules of the court.

Relevant portions of 28 U.S.C. § 2643 provide:

§ 2643. Relief

* * * * * * *

(b) If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order " " " such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision.

under Rule 45(e) of the Federal Rules of Civil Procedure (FRCP),[3] have consistently refused to compel witnesses to appear at trial unless they can be served at any place within the district or without the district that is within 100 miles of the trial situs. *See, e.g., In re Guthrie,* 733 F.2d 634 (4th Cir. 1984). The precedential value of these cases is not determinative, however, because the Court already has examined the geographic ambit of Rule 45(e) of the Rules of the USCIT in two prior actions. A motion for leave to serve subpoena beyond a 100-mile radius of the place of trial was granted in one suit, and denied in the other, reflecting a flexible method of resolving disputes involving issuance of subpoenas to compel live testimony. *See United States* v. *Nasser Moradi,* Court No. 82–1–00080 (Feb. 27, 1985) (motion granted); *Abitibi Price Sales Corp.* v. *United States,* Court No. 85–06–00793 (Oct. 24, 1988) (motion denied).

Defendants' claim is further inapplicable because this Court's unique position among the federal courts warrants a less rigid approach to the territorial limits for the effective service of subpoenas. The United States Court of International Trade possesses exclusive original subject-matter jurisdiction over "civil actions arising out of import transactions and federal statutes affecting international trade," including civil penalty suits pursuant to 19 U.S.C. § 1592. *United States* v. *Mizrahie,* 9 CIT 142, 145, 606 F. Supp. 703, 706 (1985) (citing Statement of President Carter, 16 Weekly Comp. of Pres. Doc. 2183 (Oct. 11, 1980)). To this end, "[t]he territorial jurisdiction of this Court is national in scope." *Id.* at 147, 606 F. Supp. at 708. It therefore cannot be said that this Court is bound to follow the "clear precedents" of the federal district courts' interpretation of FRCP Rule 45(e).[4]

Defendant's contention that the Court's distinct capacity to hold proceedings at "any place within the jurisdiction of the United States," 28 U.S.C. § 256(a) (1982), prevents an adoption of a more flexible rule for service of subpoenas similarly lacks merit. Historically, the rule against "service of subpoenas more than 100 miles from the courthouse [was] designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation." *Farmer* v. *Arabian American Oil Co.,* 379 U.S. 227, 234 (1964). Observed against the reality of this Court's national jurisdictional authority,

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[3]This rule reads in part:

> (1) * * * A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place *within the district,* or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena, *or at a place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place where the district court is held.* When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. (Emphasis supplied).

If application of FRCP Rule 45(e) to this case is proper, it is axiomatic several queries need to be addressed. One interesting issue is the matter of proper construction of "any place within the district," in light of the ambulatory faculty of this Court.

[4]*See Memorandum in Opposition to Plaintiff's Motion to "Waive" 100-Mile Limit on Service of Trial Subpoenas* at 5.

the complex nature of today's trials, and the mobility of modern life, shifting the situs of a trial several times to accommodate defendants' rigid position will necessarily lead to spiralling litigation costs. Defendants' inflexible theory may have some validity if the majority of the witnesses reside in a geographically limited area. The facts are otherwise in this case. Further, the policy goal behind the rule for service of subpoenas is not served if it is used as a means to suppress the truth, rather than as a measure in protecting private interest of witnesses against undue inconvenience and harassment.

It is however premature to grant the blanket waiver relief which plaintiff requests because the facts alleged in plaintiff's motion are incomplete and speculative. The Court will consider individual witness-based applications to enlarge the subpoena power on a showing that such extension serves public interest, that is, facilitates the search for truth, promotes justice, and minimizes the costs of litigation. Under appropriate circumstances, 28 U.S.C. §§ 2641(a) and 2643(b) and Rule 1 of the Rules of the USCIT will satisfy the requirement under Rule 54(e) of the Rules of this Court.

CONCLUSION

For the foregoing reasons, plaintiff's motion to waive the "100-mile rule" under Rule 45(e) of the Rules of this Court is denied at this point. The Court will however consider applications for waiver which are consistent with this opinion.

(Slip Op. 89–50)

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–07–00853

[Second Remand Determination affirmed.]

(Decided April 18, 1989)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr.*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Platte B. Moring, III*), Civil Division, United States Department of Justice, for defendant.

Dewey, Ballantine, Bushby, Palmer & Wood (*Michael H. Stein*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* On April 22, 1986, the United States Department of Commerce, International Trade Administration (ITA) issued a final affirmative countervailing duty determination in *Oil Country*

Tubular Goods from Canada, 51 Fed. Reg. 15,037 (Apr. 22, 1986). Since then, this court has twice remanded ITA's Determination because ITA, in choosing a period over which to allocate the bounty or grant received by Ipsco, failed to use data which was sufficiently particularized to the country and company under investigation or was otherwise substantiated by the record under review. In its opinion of November 23, 1989, this count remanded this case to ITA with instructions that ITA "calculate an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs in this case." *Ipsco, Inc.* v. *United States*, 12 CIT ——, 701 F.Supp 236, 241 (1988).

On February 16, 1989, ITA issued its Second Remand Determination. In that determination, ITA calculated a 21 year allocation period which ITA asserts is based on data taken from Ipsco's 1984 Annual Report. ITA states that it "arrived at the 21-year average depreciation period by subtracting from the total value of [Ipsco's] replaceable physical assets the value of construction in progress (which was not depreciated), and then divided this result by the net depreciation charged during the year." Second Remand Determination at 4.[1] Plaintiffs object to ITA's use of the 21 year period asserting that ITA improperly allocated the benefit of the subsidy or grant received to all of Ipsco's replaceable capital assets, rather than limiting the calculation to those assets which Ipsco purchased with the money it received.

Discussion

In reviewing ITA's determination that a 21 year allocation period is appropriate, this court must uphold ITA's decision unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). This court may not substitute its own judgement for that of ITA, even though the court could have justifiably come to a different conclusion had it had the burden of reviewing the matter *de novo*. *American Lamb Co.* v. *United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984), *aff'd sub nom. Armco, Inc.* v. *United States*, 760 F.2d 249 (Fed. Cir. 1985).

In the present case ITA rejected plaintiffs' proffered methodology of allocating subsidy benefits in accordance with a depreciation schedule which accounts for only those assets which are actually

[1]The court notes that the administrative record contains conflicting evidence as to Ipsco's depreciation charged during 1984. ITA used the figure from Ipsco's 1984 Highlights, page 1 of Annual Report 1984 which indicated that Ipsco's accumulated depreciation for 1984 was $11,530,000. Public Record (PR) Document Number 49 at 2643 (Page number refers to microfilm frame number.) Apparently, however, Ipsco also submitted a *Consolidated Statement of Financial Position* which indicated that its accumulated depreciation for 1984 was $9,685,000. PR 49 2662. Using the $11,530,000 figure ITA calculated a 21 year allocation period. Although ITA referred to the *Consolidated Statement* in order to assess the value of Ipsco's fixed Assets, *see* ITA letter to the court of March 28, 1989, it did not use the figures stated therein for determining Ipsco's accumulated depreciation. As neither party has indicated that ITA's decision to use the figure listed in the Highlights rather than the Consolidated Statement for purposes of calculating accumulated depreciation was either erroneous or significant, the court accepts ITA's selection of record information.

purchased with the subsidy received because such approach is "inconsistent with the Department's practice of allocating grants over a period that * * * reflects the average economic useful life of *all* replaceable physical assets, including buildings." Remand Determination at 5.[2] In its previous opinion the court instructed ITA to apply a methodology which utilizes information of record in this case. That ITA choose to allocate the benefits derived from subsidies received by Ipsco over a period which reflects the economic useful life of all of Ipsco's replaceable physical assets, rather than only those assets which were purchased with the grants received, cannot be said to be error based on the record in this case.

As noted by ITA in its Remand Determination, a grant affords a company both immediate and long term benefits. *See* Remand Determination at 2. One benefit which a company may derive from such a grant is that it may be able to purchase much needed capital equipment which it could not otherwise acquire. But income received on day one, may also benefit a company's general operations. For example, funds which might have been expended on certain capital assets might be used to support production or sales, thereby affecting overall profitability and the potential for raising further capital or for making future investments. For ITA to allocate the benefit derived from a grant solely to particularly durable physical assets that are actually purchased with the money received, would cause ITA to underestimate the general positive affect that a grant has on such company. A company which receives a grant or subsidy to purchase a particular asset receives a benefit apart from the mere ability to purchase that asset. Receipt of such subsidy allows the company to allocate its own resources in other profitable ways.

Additionally, although a subsidy or grant may have positive effects which last well into the future, ITA must be able to limit to a finite period the allocation of such benefits, in order to evaluate the impact of the subsidy on the company. If ITA were to do otherwise, ITA would presumably consistently find a *de minimis* effect because a subsidy, in addition to its short term impact, also has a long term effect which while diminishing over time, may persist nearly to infinity.

In this case ITA has chosen to limit the allocation of the subsidy to a period representing the average depreciable life of all of Ipsco's replaceable physical assets. Although this may not be a totally logical approach to grant valuation, plaintiff has failed to propose a method which the court finds is required by law, or even which can be said to be more logical or reasonable.

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[2]Plaintiffs also claim that they had no opportunity to comment upon ITA's approach on remand prior to ITA's issuance of its Second Remand Determination. Although normally parties should be afforded an opportunity to comment upon ITA's proposed determination, the court believes that in the present case it would be inappropriate to remand this matter in order to allow the parties to comment further. Plaintiffs have presented no arguments which would lead the court to believe that remanding for such a process would be fruitful. The only particularized comment that plaintiffs have made with regard to the remand results is that the depreciation period for valuing the grant should be tied to those assets which were actually purchased with the grants received. This is not a new argument; neither is it well-founded. Thus, a remand merely to allow further comment at this time would appear to serve no constructive purpose.

Because no acceptable alternative methodology is proposed and because ITA utilized information of record in applying its chosen methodology, ITA's determination is affirmed.

(Slip Op. 89–51)

AD HOC GRANITE TRADE GROUP, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND CAMPOLONGHI ITALIA S.P.A., ET AL., AND INGEMAR, S.A. AND INGEMARGA, S.A., AND ROUBIN & JANERIO, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 88–08–00653

MEMORANDUM OPINION AND ORDER

[Defendant-Intervenors motion to dismiss is denied.]

(Decided April 21, 1989)

Robins, Kaplan, Miller and Ciresi (*Charles Johnston, Jr., Pamela Deese*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*M. Martha Riese*) for defendant.

Dow, Lohnes and Albertson (*William Silverman, Ryan Trainer*) for defendant-intervenors Campolonghi Italia S.p.A., *et al.*

Kaplan, Russin and Vecchi (*Kathleen Patterson, Dennis James, Jr.*) for defendant-intervenors Ingemar, S.A., *et al.*

Stokes, Shapiro, Fussell, and Wedge (*McNeill Stokes, Stephen Farish*) for defendant-intervenors Roubin & Janerio, Inc., *et al.*

MUSGRAVE, *Judge:* Defendant-Intervenors Campolonghi *et al.*, bring a Motion to Dismiss with prejudice Counts 1 through 6 and certain portions of Court 7 of plaintiff's Complaint based on plaintiff's alleged failure to properly invoke this Court's jurisdiction. The defendant's main argument is that the plaintiff's failure to recite the appropriate jurisdictional code section, 19 U.S.C.A. § 1516(a)(3), violates USCIT Rule 8(a) which states, in part, that plaintiff's Complaint must include "a short and plain statement of the grounds upon which the Court's jurisdiction depends." Defendant-Intervenors cite *Georgetown Steel Corp.* v. *U.S.* 801 F. 2d 1308 (Fed. Cir. 1986) and *Baldwin County Welcome Center* v. *Brown* 466 U.S. 147 (1984) in support of their argument that the procedural rules of the Court must be strictly adhered to, and that failure to follow them must result in dismissal.

Plaintiff responds that failure on its part to recite a particular code section cannot deprive the Court of jurisdiction. Plaintiff cites *Conley* v. *Gibson* 355 U.S. 41 (1957) and *Beeler* v. *U.S.* 338 F.2d 687 (3rd Cir. 1964) for the proposition that the standard for pleadings is fair notice to the parties, not citation to specific statutory provisions or subsections. In the alternative, plaintiff argues that the sections

of the code that were cited can be read to confer jurisdiction upon the Court.

In *Conley, supra,* a Motion to Dismiss was filed for, among other reasons, failure to state a claim upon which relief could be granted. Although *Conley* and the instant case are not precisely analogous, the Court used language useful for analyzing this case. The Court held:

> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests * * * Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both the claim and defense and to define more narrowly the disputed facts and issues * * * The Federal Rules *reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome* and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits (emphasis supplied).

Id. at 47–48, *citing Maty* v. *Grasselli Chemical Co.,* 303 U.S. 197 (1937).

Beeler v. *United States, supra,* is closer factually to the facts involved here. In that case, plaintiffs failed to invoke the "Suits in Admiralty Act" in their Complaint and defendant argued that this failure acted to deprive the Court of jurisdiction. The Court held:

> It is well settled that the recitation of a statute can neither deprive a court of jurisdiction nor confer jurisdiction upon it. *It is the operative facts pleaded which alone can do that* * * * To hold that, having set forth facts which if proved would entitle him to recover, a plaintiff in a case like the present one loses, beyond hope of redemption, the right to pursue his action because he has cited the wrong statute as the basis for it would be indeed a sterile technicality. *Id.* at 689 (emphasis supplied).

Similarly, in *Framlau Corporation* v. *Dembling,* 360 F.Supp. 806 (1973), the Court stated "[a]though plaintiff has failed to cite a valid jurisdictional statute as a basis for its complaint, Rule 8(a)(1) of the Federal Rules of Civil Procedure[1] only requires that a pleading setting forth a claim for relief contain a short and plain statement of the grounds upon which the Court's jurisdiction depends. If there is a statement in the complaint sufficient to give the court jurisdiction, the particular statute conferring jurisdiction need not be specifically pleaded." *Id.* at 808, *citing William* v. *United States,* 405 F.2d 773, 776 (9th Cir. 1969); *Chasis* v. *Progress Manufacturing Company,* 382 F.2d 773, 776 (3rd Cir. 1967); *Sikora* v. *Brenner,* 126 U.S. App. D.C. 357, 379 F.2d 134, 136 (1967); *Paynes* v. *Lee,* 377 F.2d

[1]The language of the Federal Rule of Civil Procedure, 8(a)(1) is the same as that in USCIT Rule 8(a)(1).

61, 63 (5th Cir. 1967); *Ivey* v. *Frost,* 346 F.2d 115 (8th Cir. 1965); *Eidschun* v. *Pierce,* 335 F. Supp. 603, 615 (S.D. Iowa 1971); *Uhler* v. *Commonwealth of Pennsylvania,* 321 F. Supp. 490, 491 (E.D.Pa. 1970).

Plaintiff in this action would be unjustly denied his day in Court were this court to deny access: the plaintiff here has clearly cited facts upon which the Court's jurisdiction can be predicated. Plaintiff's Complaint, paragraph one, states unequivocally the basis of the plaintiff's grievance and shows adequate basis for the Court to retain jurisdiction of this matter. To wit:

> Plaintiff seeks judgment on the administrative record reversing or in the alternative remanding certain portions of the final affirmative determination of sales at less than fair value made by the International Trade Administration ("ITA") of the United States Department of Commerce and the final negative determination of no material injury by reason of imports of certain granite from Italy and Spain made by the United States International Trade Commission ("the Commission"). The portions of the ITA administrative determination which Plaintiff seeks to reverse had the effect of lowering the final Italian dumping margins determined by the ITA. Plaintiff seeks to reverse the Commission's determination of no material injury by reason of imports from Italy and Spain. *Complaint,* at 1–2.

Plaintiff goes on to cite to sections of the Tariff Act of 1930, including, as amended, 19 U.S.C.A. § 1516(a)(a)(2)(B)(i)–(ii) in support of its jurisdictional claim. Clearly, as shown by the above language, this Court has jurisdiction of this case and the plaintiff's failure to cite 19 U.S.C.A. § 1516(a)(3) specifically cannot be used as reason to dismiss a valid Complaint.

The defendant's reliance on *Georgetown Steel, supra,* and *Baldwin County Welcome Center, supra,* is inappropriate in this instance. In both of those cases the Court was dealing with the timeliness of filing of Court documents. There is no dispute here as to that issue. Plaintiff's Complaint was timely filed. Similarly, the defendant United States in their Memorandum in Support of Defendant-Intervenors' Motion to Dismiss, cite case law for the proposition that the United States cannot be sued except as it consents to be sued and that the plaintiff's failure to premise the Court's jurisdiction on 19 U.S.C.A. § 1516(a)(3) violates this precedent. This Court has no quarrel with defendant's basic assertion, but finds that it does not apply here. That is, this Court finds that the plaintiff's Complaint is in compliance with the terms of USCIT Rule 8, and thus is within the terms of the Government's consent.

For the above stated reasons there is no reason to require the plaintiff to amend the Complaint by citing a particular Statutory Section. The Defendant-Intervenors' Motion to Dismiss and defendant's proposed Order of Dismissal are therefore denied.

The Court has considered Plaintiff's request for attorney's fees, costs and expenses incurred. The Court is disturbed by the frivolous nature of the Defendant-Intervenor's motion, and the reliance upon clearly inappropriate cases (specifically, those relating to timeliness) but withholds decision, for the present, on any USCIT Rule 11 sanctions.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED
				Item No. and rate
C89/48	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	82-8-01207	Item 534.94 Various rates
C89/49	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	82-9-01331	Item 534.94 Various rates
C89/50	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	83-5-00695	Item 534.94 Various rates
C89/51	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	86-8-01018	Item 534.94 Various rates
C89/52	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	86-11-01434	Item 534.94 Various rates
C89/53	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	87-4-00612	Item 534.94 Various rates
C89/54	Re, C.J. April 5, 1989	Belwith Int'l, Inc.	87-10-01019	Item 534.94 Various rates
C89/55	Re, C.J. April 7, 1989	Belwith Int'l, Inc.	83-4-00557	Item 534.94 Various rates
C89/56	Re, C.J. April 7, 1989	Belwith Int'l, Inc.	88-8-00624	Item 534.94 Various rates

CATION DECISIONS

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	Item No. and rate		
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Detroit Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Detroit Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Detroit Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Detroit Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Detroit Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs
	Item 727.55 or 727.70 Various rates	Agreed statement of facts	Los Angeles Porcelain knobs

R E M I N D E R

REJECTION OF PLEADINGS, MOTIONS OR OTHER PAPERS

The Clerk of the Court is required by USCIT R. 82(d) not to accept for filing any paper, or to return any paper which has been filed, which does not comply with the procedural requirements of the rules or practice of the Court.

The following are examples of some of the practices that will result in a notice of rejection from the Office of the Clerk and a return of the papers:

1. A pleading, motion, or other paper by facsimile transmission without prior permission of the Clerk (USCIT R. 5);
2. The failure to obtain a court number from Clerk's Office prior to the commencement of an action in which the plaintiff is required to make service of the summons (Appendix of Forms, Specific Instructions, Form 3);
3. A motion for an extension of time after the Court has granted a final extension of time;
4. A pleading, motion, or other paper with significant or substantial hand-written corrections made just prior to, at or after the time of filing;
5. A pleading, motion, or other paper without (a) a proposed order, (b) a certificate of service, or (c) the correct number of copies;
6. A pleading, motion, or other paper in an action where counsel has failed to properly notify the court of any change in the name of counsel of record, or counsel's address or phone number (USCIT R. 75(e)); and
7. A substitution of attorney without the requisite notification to the previous attorney (USCIT R. 75(c)).

Dated: April 28, 1989.

JOSEPH E. LOMBARDI,
Clerk of the Court.

Index

Customs Bulletin and Decisions
Vol. 23, No. 20, May 17, 1989

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Coastwise transportation of certain articles; part 4, CR amended:		
Antigua and Barbuda	89–55	25
Saudi Arabia	89–56	28
Drawback decisions, synopses of; sec. 1313(b) U.S.C.	89–54	19
Companies:		
Armstrong World Industries	89–54–A	19
Beatrice/Hunt-Wesson	89–54–B	19
Dow Chemical Co.	89–54–C	19
du Pont de Nemours & Co., Inc.	89–54–D,E,F,G	20,21
Foote Mineral Co.	89–54–H	21
GAF Chemicals Corp.	89–54–I	21
Globe Metallurgical	89–54–J	21
Goodyear Tire and Rubber Co.	89–54–K,L	21
Hall Chemical Co.	89–54–M	22
Ludlow Corp.	89–54–N	22
Reading Alloys, Inc.	89–54–O	22
Rex-Rosenlew International	89–54–P	22
Sterling Drug	89–54–Q	23
Sybron Chemicals	89–54–R	23
Titanium Wire Corp.	89–54–S	23
Uniroyal Goodrich Tire Co.	89–54–T,U,V,W,X	23,24
Wellman Inc.	89–54–Y	25
Wickman Oil Terminals	89–54–Z	25
Merchandise:		
Blend stocks, high and low octane	89–54–Z	25
4–bromofluorobenzene	89–54–D	20
Bronze plated wire	89–54–X	24
1,4-butanediol	89–54–I	21
Di-2-ethylhexyl phthalate	89–54–A	19
Electrolytic manganese metal	89–54–M	22
Hydrogen peroxide	89–54–F	20
Iohexol powder	89–54–Q	23
Ionac cc	89–54–R	23
Kagarax/Morfax	89–54–K	21
Lithium carbonate (crystals)	89–54–H	21
Magnesium	89–54–J	21
Methanol	89–54–G	20
Polyethylene	89–54–C	19
Methyl aceto acetate	89–54–D	20

Drawback decisions, synopses of (continued):
Merchandise (continued): T.D. No. Page
Modacrylic staple fiber 89–54–U 24
Nylon 6 ..... 89–54–Y 25
Nylon filament yarns 89–54–V,W 24
o-toluidine 89–54–L 21
Polyester fabric and cord 89–54–T 23
Polyester yarn 89–54–N 22
Polyethylene resin, linear low density 89–54–P 22
Titanium rod, alloyed and unalloyed 89–54–S 23
Tomato paste 89–54–B 19
Vanadium pentoxide, fused flake 89–54–O 22
Express consignment operators/carriers, procedures for clearance of cargo carried by; parts 128, 143, and 178, CR amended. 89–53 1

Proposed Rulemaking

Page
Field organization, Customs Service; Nagales District 31

U.S. Court of International Trade

Slip Opinions

Slip Op. No. Page
Ad Hoc Granite Trade Group *v.* United States 89–51 69
Floral Trade Council of Davis, California *v.* United States .. 89–48 61
Ipsco, Inc. *v.* United States 89–50 66
LMI—La Metalli Industriale, S.p.A. *v.* United States 89–46 37
Thyssen Steel Co. *v.* United States 89–47 55
United States *v.* Daewoo International Corp. 89–49 63

Abstracted Decisions

Decision No. Page
Classification C89/48–C89/56 73

Notice

Page
Reminder: Rejection of pleadings, motions, or other papers 75

*U.S. G.P.O. 1989-241-040:80039